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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

AT SAN JOSÉ

SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSÉ, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10, inclusive,

Defendants.

AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS

Consolidated Case No. 1-12-CV-225926

[Consolidated with Case Nos. 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574, 1-12-CV-227864, and 1-12-CV-233660]

Assigned For All Purposes To:
Judge Patricia Lucas
Department 2

AFSCME LOCAL 101'S SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ITS REPLY RE: SUPPLEMENTAL MOTION FOR ATTORNEYS' FEES, PURSUANT TO JUDGE LUCAS' ORDER OF OCTOBER 1, 2014

Hearing Date:	December 16, 2014
Hearing Time:	9:00 a.m.
Courtroom:	2
Judge:	Honorable Patricia Lucas
Action Filed:	June 6, 2012
Trial Date:	July 22, 2013

Plaintiff/Petitioner AFSCME Local 101 hereby requests the Court to take judicial notice pursuant to California Evidence Code Sections 450 *et seq.*, and in accordance with California Rules of Court 3.1113, subdivision (l) and 3.1306, subdivision (c), of the following material, a true and correct copy of which are attached hereto. Exhibits A-C were all filed in *City of San José v. San José*

Police Officers' Assoc., et. al. (US District Court for the Northern District of California, San José Division, Case No. 5:12-CV-02904-LHK, a case in the Municipal Employees' Association ("MEF") of AFSCME Local 101 was named as a defendant. Exhibit D is a stipulation and order entered in this case.

Exhibit A	Defendant Municipal Employees' Association ("MEF"), AFSCME Local 101's Memorandum of Points and Authorities in Support of Motion to Dismiss City of San José's First Amended Complaint in federal court action, filed Aug. 3, 2012
Exhibit B	Plaintiff City of San José's Opposition to Plaintiffs' Motions to Dismiss its federal action, filed August 20, 2012
Exhibit C	Defendants' (including MEF) Consolidated Reply in support of Motion to Dismiss City's federal court action, filed September 13, 2012
Exhibit D	Stipulation and Order Regarding Pre-Trial and Trial Schedule in this above-captioned state court case, signed by Judge Lucas on April 23, 2013, and filed by Deputy Clerk on April 24, 2013

Exhibits A-D are properly subject to judicial notice pursuant to Evidence Code sections 453 and 452(d) ("Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States."). They are relevant for the reasons set forth in AFSCME's memorandum of points and authorities in support of this motion. For these reasons, Plaintiff respectfully requests that the Court take judicial notice of those documents.

Dated: December 4, 2014

BEESON, TAYER & BODINE, APC

By: _____
TEAGUE P. PATERSON
VISHTASP M. SOROUSHIAN
Attorneys for AFSCME LOCAL 101

PROOF OF SERVICE

SANTA CLARA SUPERIOR COURT

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Beeson, Tayer & Bodine, Ross House, Suite 200, 483 Ninth Street, Oakland, California, 94607-4051. On this day, I served the foregoing Document(s):

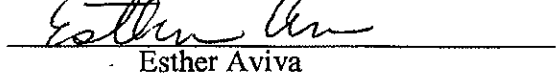
AFSCME LOCAL 101'S SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ITS REPLY MEMORANDUM RE: SUPPLEMENTAL MOTION FOR ATTORNEYS' FEES PURSUANT TO JUDGE LUCAS' ORDER OF OCTOBER 1, 2014

☒ **By Mail** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

☒ **By Electronic Service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

SEE SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, December 4, 2014.



Esther Aviva

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EXHIBIT A

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AFSCME LOCAL 101

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AT SAN JOSÉ

CITY OF SAN JOSÉ,

Defendant,

v.

SAN JOSÉ POLICE OFFICERS' ASSOCIATION; SAN JOSÉ FIREFIGHTERS, I.A.F.F. LOCAL 230; MUNICIPAL EMPLOYEES' FEDERATION, AFSCME, LOCAL 101; CITY ASSOCIATION OF MANAGEMENT PERSONNEL, IFPTE LOCAL 21,

Defendants.

Case No. 5:12-CV-02904-LHK

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

[FED. R. CIV. PROC. 12(B)]

[CONCURRENTLY FILED REQUEST FOR JUDICIAL NOTICE]

Hearing Date:	October 4, 2012
Hearing Time:	1:30 p.m.
Courtroom:	Department 8
Judge:	Lucy H. Koh
Complaint Filed:	June 5, 2012
Trial Date:	None Set

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I. INTRODUCTION

By this motion, Defendant Municipal Employees' Federation ("MEF") of American Federation of State, County and Municipal Employees, Local 101 ("AFSCME" or "Union") seeks an order either dismissing with prejudice or staying the City of San José's ("City") First Amended Complaint ("FAC"). AFSCME joins and incorporates into this motion as though set forth within, the arguments advanced by Co-Defendants the San José Police Officers' Association ("POA") and the San José Firefighters, I.A.F.F., Local 230 ("Firefighters") in the memoranda of points and authorities in support of their motions pursuant to Rule 12(b) of the Federal Rules of Civil Procedure (respectively "POA Motion" and "Firefighters' Motion"). Pursuant to the Court's July 24, 2012, "Stipulation and Order Re: Consolidated Briefing on Motions to Dismiss," defendant MEF submits alternative grounds for dismissal of the City's complaint. In particular, the City's complaint should be dismissed because although the City's premature declaratory action purports to anticipate federal questions, AFSCME has raised *no* such federal questions with respect to the City's ordinance. Rather, it has pursued its claims in state court strictly under state law. Because, as contended by the City, the issues raised by the parties are novel and/or raise questions undecided by state law, any decision rendered by this court or the Ninth Circuit Court of Appeals will have no precedential value with respect to such issues of state law. Accordingly, proceeding to hear the City's action will neither serve the important goal of judicial efficiency nor settle the issues raised with respect to individuals or entities not a party to this action.

As a case of first impression involving a novel and controversial local law, it is important that any disposition of the issues presented establish precedent to guide the state courts in resolving similar future conflicts. Decisions issued by this Court or the Ninth Circuit Court of Appeals will have no *stare decisis* affect within the state court system. This is because the state courts have not yet interpreted Measure B or the vested rights doctrine in the context of the amendments made by Measure B to the City's Federated Retirement System. Any interpretation adopted by a federal court will not bind the courts of the state. Similarly, any decision by the federal courts with respect to the state constitution and common law doctrines invoked in this case will have no binding affect on the state courts, and a contrary decision by the state's appellate courts will—in fact—bind federals court

with respect to matters of state law. Recently, in *Retired Employees Assn. of Orange County, Inc. v. County of Orange*, 610 F.3d 1099 (9th Cir. 2010) (hereinafter "*Orange County*"), the Ninth Circuit was unable to render a decision with respect to California's vested rights doctrine, and, consequently, certified a question to the California Supreme Court and adopted its answer. (*Retired Employees Ass'n of Orange County, Inc. v. County of Orange*, 663 F.3d 1292 (9th Cir. 2011) (hereinafter "*Orange County II*").) This process added inefficiency to resolving the parties' dispute and greatly delayed disposition of the case. (*Id.* ("In light of the nature of the dispute in this case, *and in light of the delay that has already taken place*, we encourage the district court to act promptly.") (emphasis added).)

Finally, a close reading of AFSCME's complaint indicates that no questions of federal law are raised. However, even if the court does consider federal constitutional questions raised by the City in its anticipatory declaratory action, any such questions decided by this court or the Ninth Circuit will not bind the state courts. Because a decision in this case has absolutely no precedential value in the state courts, the prudent and efficient course here is to dismiss the City's anticipatory action with prejudice and/or abstain in order to allow the state courts to establish precedent with respect to this novel area of legislation.

In the alternative, this court should refuse to exercise supplemental jurisdiction over the state law claims in order to afford state courts the opportunity to clarify and develop state law in this area and in the interest of "economy, convenience, fairness and comity." (*Executive Software N. Am., Inc. v. United States Dist. Court*, 24 F.3d 1545, 1557-58 (9th Cir.1994), *overruled on other grounds by California Dept. of Water Resources v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008) (hereinafter "*Executive Software*").) Furthermore, if this court dismisses the federal law claims for lack of subject matter jurisdiction, it is *required* to dismiss the state law claims as well.

II. SUMMARY OF RELEVANT ALLEGATIONS AND PROCEDURAL BACKGROUND

In the interest of brevity, defendant MEF adopts and incorporates the statement of facts and procedure as set forth in the POA's and Firefighters' Motions, with a few additions pertinent to AFSCME. Subsequent to the filing of those motions, the court set a hearing on all four defendants' Motions to Dismiss the FAC for October 4, 2012, pursuant to a joint stipulation by all parties.

AFSCME, Local 101 represents the members of MEF and the Confidential Employees' Organization ("CEO"). Although CEO is a party to AFSCME's parallel state court action (*AFSCME, Local 101 v. City of San José*, Santa Clara Case No. 1-12-CV227864), CEO was not named in this suit. MEF and CEO members are non-supervisory, non-public safety city employees. AFSCME members are a part of the City's Federated City Retirement System and Federated City Retirement Plan. MEF's members are directly affected by Measure B and its elimination of the vested right to receive the full measure of promised retirement and other post-employment benefits. Measure B also imposes on MEF's members certain funding obligations that AFSCME contends are unconstitutional under the California Constitution. As is admitted by all parties, Measure B is the first local ordinance adopted by a California charter city that impedes upon public employees' vested rights to retirement benefits in such a manner, and that imposes such *ultra vires* funding obligations on city employees.

III. AUTHORITY FOR MOTION TO DISMISS

A party may present a motion to dismiss for reasons not enumerated by the Federal Rules of Civil Procedure ("FRCP"), Rule 12(b), and such motion is subject to regular motion proceedings. (Wyatt v. Terhune, 315 F.3d 1109, 1119 (9th Cir. 2003); Ritza v. International Longshoremen's & Warehousemen's Union, 837 F.2d 365, 369 (9th Cir. 1988).)

Furthermore, a party may challenge the court's subject matter jurisdiction (FRCP, Rule 12(b)(1)) because supplemental jurisdiction is improper according to 28 U.S.C. Section 1367. (See Sparrow v. Mazda American Credit, 385 F.Supp.2d 1063 (E.D. Cal. 2005); A.J. Oliver v. Longs Drug Stores California, 2008 WL 544399 (S.D. Cal. 2008).)

IV. ARGUMENT

This case presents issues of extreme significance to the state of California, its cities and counties, and public sector employees and retirees. The outcome to the litigation over Measure B has the potential to provide guidance and set the contours on what this state's municipalities can and cannot do regarding the curtailing of public employee retirement security. No city or local agency has gone as far as Plaintiff in altering earned benefits or changing the benefits applicable to current employees (as opposed to future employees). The City has attempted, but cannot, join every interested party to this litigation, and so no decision by this – or any other – federal court can have a

binding or precedential effect with respect to such non-parties. This is because California courts are free to disregard decisions rendered by federal courts that purport to decide matters of state law. With respect to the instant case, any decision is essentially advisory and will have no implication beyond these immediate proceedings. The advisory nature of the declaratory judgment the City seeks is especially apparent where AFSCME has raised no issue of federal law in its state court action.

On the other hand a decision rendered by a state court — of which all defendants are presently seeking in state court actions — will set precedent within the California court system and may even establish precedent for future litigation in federal court. (*See, e.g., Retired Employees Ass'n of Orange County, Inc. v. County of Orange*, 52 Cal.4th 1171 (2011); *Orange County II, supra,* 663 F.3d at 1292.) Therefore, this court should dismiss the case in its entirety and allow the courts of California to render a decision, which will lead to establishing binding precedent.

In the alternative, this court should at least dismiss the state law claims and allow the parties to proceed in state court. (Of course, pursuant to Ninth Circuit precedent, if this court dismisses the federal causes of action for lack of subject matter jurisdiction, it cannot exercise supplemental jurisdiction over the state law claims and *must* dismiss them.)

Furthermore, this court should exercise its discretion and dismiss the state law claims pursuant to 28 U.S.C. Section 1367(c) in the interest of "economy, convenience, fairness, and comity." Again, this circuit's inability to render a decision with precedential value strongly weighs in favor of declining to exercise discretion over the state law claims.

A. <u>Any Decision Rendered by This Court Will Not Establish Precedent in the State Courts.</u>

A decision by this circuit will not bind state courts regarding the extent of vested contractual rights to retirement benefits enjoyed by MEF members. Similarly, this court's interpretation of Measure B will not bind California courts, and state courts are free to interpret Measure B or other similar statutes in a manner that contradicts this court's interpretation in future cases. Furthermore, any decision made with respect to the state or *even federal* constitutions or common law doctrines invoked in this case has no precedential value in the state courts.

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In contrast, state court interpretations of the vested rights doctrine, Measure B, and the state common law doctrines invoked in discerning vested rights under California and Federal constitutional law may serve as binding precedent in any future state court litigation. A decision by the California Supreme Court on the state law issues presented would establish precedent in this circuit, as would a decision rendered by a state appellate court. Finally, although AFSCME's state court complaint does not allege any violation of the federal constitution, a decision by the California Supreme Court on a federal constitutional law issue also will bind state courts in the absence of a contrary opinion by the United States Supreme Court; the City is free to seek a judgment on those issues in the state court actions. These considerations strongly favor dismissal on abstention grounds.

a. *Vested Rights Analysis*

As a preliminary matter, this court must decide to what extent MEF members enjoy a vested contractual right to retirement benefits and when those rights became vested. Such questions are answered pursuant to state law, even when raised under the federal constitution (*Orange County, supra*, 610 F.3d at 1102 ("For purposes of Contract Clause analysis, 'federal courts look to state law to determine the existence of a contract'), and the Ninth Circuit has previously deferred to the state's highest court when presented with such issues (*see generally id.*). Of course, AFSCME and its Co-Defendants have not raised any question under the federal Constitution. (*See* Exhibit 1 to Request for Judicial Notice filed herewith ("AFSCME Complaint"). Because a Ninth Circuit decision on the issue will not bind California courts (*see People v. Bradley*, 1 Cal.3d 80, 1 Cal.3d 80, 86 (1969)), it is best that the state's courts grapple with such novel issues. (*See also Martinez v. Maverick County Water Control and Improvement District*, 219 F.2d 666 (5th Cir. 1955) (affirming district court's dismissal of class-action suit for declaratory relief and stating, "Every question of law presented is one of local State law, as to which the decisions of the Texas State Courts would be controlling as precedents. Hence, the declaratory judgment of the federal court would not be binding as *stare decisis*.")

Here, there are currently several state court actions pending which will, in due course, resolve the questions of law raised by the City. Therefore, the Court has little reason not to abstain from hearing the City's action and essentially render an advisory opinion.

b. *Interpretation of Measure B*

It is a futile exercise for a federal court to interpret a state statute before affording that state's courts an opportunity to construct it. A federal court's construction of state or local legislation is not binding on the state courts. Therefore, state courts are still free to interpret the statute differently than their federal counterparts and to reach a contrary conclusion. (*See, e.g., Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 459-460 (1945) ("No state court has decided [questions of statutory interpretation regarding a state statute], briefs and argument offer us little aid in their solution, *and no solution which we could tender would be controlling on the state courts*.") (emphasis added) (hereinafter "*McAdory*").)

Because federal court opinions regarding state legislation lack this *stare decisis* effect, California courts have interpreted both civil and criminal statutes differently than the Ninth Circuit. (*See, e.g., Schmidlin v. City of Palo Alto*, 157 Cal.App.4th 728, 759-60 (2008) (disagreeing with and declining to follow Ninth Circuit's construction of Gov. Code Sect. 945.3); *People v. Albillar*, 51 Cal.4th 47, 66 (2010) (agreeing with Court of Appeal in *People v. Romero, infra*); *People v. Romero*, 140 Cal.App.4th 15, 19 (2006) (declining to interpret Pen. Code Sect. 186.22, subd. (b)(1) as did the Ninth Circuit).) Such a situation is highly inefficient, leads to needless repeat litigation, and fails to settle important questions of law. It also may lead to inconsistent results, as suggested by the cases cited above.

The Supreme Court has specifically recognized this futility in federal declaratory judgment actions. (*See, e.g., Albertson v. Millard*, 345 U.S. 242 (1953) (hereinafter "*Albertson*"); *McAdory, supra,* 325 U.S. at 450.) In *Albertson*, the governor of Michigan had signed into law a statute "requir[ing] the registration of Communists, the Communist Party and Communist front organizations" and "prevent[ing] them from appearing on any ballot in the State." Although the state Legislature had defined the terms "Communist," "Communist Party," and "Communist front organization[,]" the plaintiffs alleged that those terms were unconstitutionally vague and sought a "declaratory judgment to that effect" and an "injunction to prevent state officials and officers from enforcing the Act." (*Id.* at 243.). "A three-judge District Court found the Act constitutional and appeal was taken to th[e Supreme Court]." In reversing and remanding, the Court stated:

> Interpretation of state legislation is primarily the function of state authorities, judicial and administrative. *The construction given to a state statute by the state courts is binding upon federal courts.* There has been no interpretation of this statute by the state courts. The absence of such construction stems from the fact this action in federal court *was commenced only five days after the statute became law.* [1]

(*Id.* at 244 (emphasis added).)

The Court noted that a concurrent state court action seeking a declaratory judgment that the statute was unconstitutional on federal and state law grounds was "being held in abeyance pending [the Court's mandate] and decision in this case." (*Millard*, 345 U.S. at 244.) The high Court "[d]eem[ed] it appropriate ... that the state courts construe[d] th[e] statute before the District Court further consider[ed] the action." (*Id.* at 244-45.) Ultimately, the District Court was ordered to remove its restraint of the pending state court action and hold its own federal action in abeyance while the state action proceeded. There is no doubt that the proceedings up to the United States Supreme Court and back down again added significant delay and inefficiency to the resolution of the proper application of a local law.

In this case, the legality of a newly adopted, local statute is in question. While the state court's construction of Measure B will bind the courts in this circuit, any construction given to it by the Ninth Circuit has no *stare decisis* value with the California courts. Where AFSCME has raised only state law claims, there is no cognizable reason why the case should not proceed in state court, nor any basis to a contention that the federal district court's consideration of AFSCME's case will lead to greater efficiency. Therefore, the state courts are the necessary venue for this action.

c. *Constitutional Interpretation*

The California Supreme Court's interpretation of the state constitution binds the United States Supreme Court and lower federal courts.[2] (*Quong Ham Wah Co. v. Industrial Acc. Commission of California*, 255 U.S. 445, 448 (1921).) Furthermore, as is shown in the next section, even a California Court of Appeal decision on the issue would most likely bind the courts in this circuit.

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[1] In this case, the City did not even wait *five days* after Measure B passed before commencing this action. As previously noted, it commenced this action even before Measure B passed.

[2] MEF believes that because of the importance of this issue to California, its chartered entities, and state and public-sector employees, the state court actions have a realistic chance of receiving review by the California Supreme Court. However, MEF also believes that the chances for review by the United States Supreme Court are slim.

However, federal court decisions interpreting the state constitution *do not* bind California courts (*People v. Bradley*, 1 Cal.3d 80, 1 Cal.3d 80, 86 (1969)), and state courts may interpret provisions of the state constitution differently than constructions given to parallel federal constitutional provisions by the United States Supreme Court (*see People v. Disbrow*, 16 Cal.3d 101, 114-15 (1976), *abrogated on other grounds* ("We pause finally to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution.")).

On the other hand, the decisions of lower federal courts on questions of federal constitutional law *do not* bind California courts. (*People v. Bradley, supra,* 1 Cal.3d 80, 86 (1969).) Unless the United States Supreme Court has rendered a decision on the issue, California courts are bound by the decisions of their own highest court on questions of federal constitutional law. (*People v. Camacho*, 23 Cal.4th 824, 830 fn.1 (2000).) Clearly then, there is no advantage to having these issues decided first by the federal courts where doing so will not finally settle the issues raised by the City and defendants in their pending state court actions.

d. *The Binding Affect of State Court Decisions on Issues of State Law on Federal Courts*

Again, the Ninth Circuit is bound to follow the California Supreme Court's holdings and dicta in regards to its interpretations of state law. (*Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1164 (9th Cir. 1995) ("The district court, like us, is bound to follow the considered dicta as well as the holdings of the California Supreme Court when applying California law.").) In the absence of a decision by the state's highest court, federal courts are bound by interpretations of state law pronounced by the California Court of Appeal "unless it is convinced by other persuasive data that the [California Supreme Court] would decide otherwise." (*West v. American Telephone and Telegraph Co.*311 U.S. 223, 237-38 (1940); *see also In re Watts*, 298 F.3d 1077, 1083 (9th Cir. 2002).) As such, the Ninth Circuit's interpretation of state law is only binding on courts in the Ninth Circuit "in the absence of any subsequent indication from the California courts that [its] interpretation [of state law] was incorrect." (*Id.*) Once a state appellate court issues a contrary decision, there is no longer any

precedential value to the Ninth Circuit decision.

Given the relative novelty of the state law issues at play in this case, a future decision by the California Court of Appeal will likely uproot this court's decision and bind federal courts until the California Supreme Court considers the issues of state law presented. Therefore, a Ninth Circuit decision in this case would be grossly inefficient and constitute a considerable waste of judicial resources.

e. *Federal Court Preference for Adjudication by State Courts*

At times, federal courts hesitantly render opinions involving important issues of state law when required to; however, that is not the preferred method of adjudicating such claims. A Ninth Circuit justice recently expressed frustration with the California Supreme Court for declining the Ninth Circuit's request for certification in *Orange County Dept. of Educ. v. Calif. Dept. of Educ.*, 668 F.3d 1052, 1067 (Bybee, J., dissenting) (hereinafter "*Dept. of Educ.*"), stating:

> It is more than ironic that, in a case in which there is no discernible federal interest, the California Supreme Court would ignore our invitation to decide a convoluted matter of state law in a dispute between California state agencies. We do not request certification lightly, and it is surprising that California would prefer that we decide such difficult questions ourselves when we have offered to defer to its own courts.

(*Id.*)

In that case, there was no parallel state court proceeding on the issue presented, and the federal court was responsible for adjudicating the matter despite the California Supreme Court's declination to answer the certified question. (*See Dept. of Educ., supra,* 668 F.3d. at 1066 (Bybee, J., dissenting).) As a result, the decision has no precedential value beyond the affairs of the parties directly involved. However, here, there *are* parallel state court actions in this instance, and this court can avoid the situation that resulted in *Dept. of Educ.* by allowing the state courts to resolve this dispute in the first place. Since "there is no discernible federal interest" in this case, it is best left to the state courts to decide.

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B. The Lack of Precedential Value to a Federal Court Decision Favors Abstention.

In contemplating abstention pursuant to *Brillhart v. Excess Insurance Company of America*, 316 U.S. 491 (1942) (hereinafter "*Brillhart*"), federal courts consider whether "the district court should avoid needless determination of state law issues...." (*Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 672 (9th Cir. 2005) (internal citations and quotations omitted).) The fact that a federal court decision in this case would lack precedential value with respect to important and yet-undecided issues of state law weighs heavily in favor of *Brillhart* abstention[3]. On the other hand, the pending state law actions can resolve this dispute and set precedent with regards to the statutory and constitutional questions presented.

Furthermore, the inability of this circuit to bind California courts also weighs in favor of abstention pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498-502 (1941) (hereinafter "*Pullman*"). The third *Pullman* factor is whether "any federal court construction of the state law might, at any time, be upended by a decision of the state courts." (*Smelt v. County of Orange*, 447 F.3d 673, 679 (9th Cir. 2006).) With respect to this prong, the Supreme Court has stated:

> There is first the Pullman concern: that a federal court will be forced to interpret state law without the benefit of state-court consideration and therefore *under circumstances where a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time- thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless.*

(*Moore v. Sims*, 442 U.S. 415, 428 (1979) (reversing and remanding case to district court with orders to dismiss) (emphasis added).)

In this case, the state courts have not yet interpreted Measure B or any statute similar to it, and they have not confronted the specific state (or federal) law issues presented. A decision by this court on the state and/or federal law issues presented in this case will not bind the state courts, as they are free to render contrary decisions that would then have a *stare decisis* effect. Therefore, pursuant to

[3] The doctrines of *Brillhart* and *Pullman* Abstention, *infra*, are discussed more extensively in the POA and Firefighters' Motions brought pursuant to Fed. R. Civ. Proc., Rule 12(b). Because MEF joins in those motions, we do not burden the court with repetitive discussion of these doctrines or repeat the arguments made within those briefs.

the aforementioned abstention doctrines, this court should abstain from entertaining plaintiff's challenge and dismiss the suit with prejudice.

C. In the Alternative, This Court Should Decline to Exercise Supplemental Jurisdiction Over Defendants' State Law Claims.

It is MEF's position that this motion should be decided in its favor on the basis of the arguments already advanced in this and Co-Defendants' briefs. Alternatively however, the Court should decline to exercise supplemental jurisdiction over the City's state law claims in the interest of "economy, convenience, fairness and comity." (*Executive Software, supra,* 24 F.3d at 1557-58.)

Supplemental jurisdiction over state law claims is permitted under 28 U.S.C. Section 1367, which gives district courts "supplemental jurisdiction" over all state claims "that are so related to [the federal] claims in the action ... that they form part of the same case or controversy under Article III of the United States Constitution." Most problematic for the City, however, is that AFSCME has posed no federal claims in its state court action, and, consequently, the court has no jurisdiction to "supplement."

Nevertheless, a federal district court may exercise its discretion and decline to exercise supplemental jurisdiction when warranted on a case-by-case basis. (*Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004).) In exercising discretion, a court determines "whether declining supplemental jurisdiction 'comports with the underlying objective of most sensibly accommodat[ing] the values of economy, convenience, fairness and comity.'" (*Ibid* (citation omitted).)

A court may decline jurisdiction over a state law claim if:

> (1) the claims raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(28 U.S.C. § 1367(c).) "[A]ctually exercising discretion and deciding whether to decline, or to retain, supplemental jurisdiction over state law claims when any factor in subdivision (c) is implicated is a responsibility that district courts are duty-bound to take seriously." (*Acri v. Varian Associates*, 114

F.3d 999, 1001 (9th Cir. 1997), *en banc*.)

Of course if a federal court dismisses a plaintiff's federal claims for lack of subject matter jurisdiction, it may not exercise supplemental jurisdiction over the state law claims and *must* dismiss them as well. (*Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001).) Therefore, if the Court dismisses or stays the federal claims in this case for that reason, it should dismiss the state law claims as well.

This court should dismiss the state law claims because they implicate both novel and complex issues. (28 U.S.C. § 1367(c)(1).) Furthermore, the court should dismiss the claims because adjudicating them creates the potential for conflicting interpretations of state law with the state courts. (*See Wilson v. PFS, LLC dba McDonald's # 23315, et al.*, 493 F.Supp.2d 1122, 1126 (S.D. Cal. 2007).)

Additionally, AFSCME and its Co-Defendants assert more causes of actions under state than federal law, and this litigation arose because of the act of a subdivision of the state. Therefore, the state law claims are properly dismissed from the City's action because they "substantially predominate over the [federal] claims...." (28 U.S.C. § 1367(c)(2).) Finally, the arguments set forth in the POA and Firefighters' Motions as well as the discussion regarding *stare decisis* in this motion constitute "exceptional circumstances" and "compelling reasons" warranting dismissal pursuant to 28 U.S.C. Section 1367(c)(4). (*See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."); *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 ("[a]djudicating state-law claims in federal court while identical claims are pending in state court would be a pointless waste of judicial resources"), *tacitly approved by Ninth Circuit in Executive Software, supra*, 24 F.3d at 1560 fn.12; *Nicholson v. Lenczewski*, 356 F.Supp.2d 157, 166 (D.Conn. 2005) ("The court should decline to exercise supplemental jurisdiction, however, when state law issues would predominate the litigation *or the federal court would be required to interpret state law in the absence of state precedent.*") (emphasis added).) Dismissal on such bases would accommodate the values of "economy, convenience, fairness and comity."

For the reasons set forth in this motion and that of the POA and Firefighters, this Court should dismiss the City's state law claims with prejudice, as they are more properly addressed in by the court of the State of California in the parallel actions currently pending between the parties.

IV. CONCLUSION

For all these reasons and those set forth in Co-Defendants' motions, this Court should dismiss this action with prejudice. In the alternative, the City's action should be stayed pending determination of the questions of state law more properly decided by the courts of California. In any event, the court should decline to exercise supplemental jurisdiction over Defendants' state-law claims and stay the federal law claims based on federal abstention principles in favor of the ongoing state court actions.

Dated: August 3, 2012

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CITY OF SAN JOSE,

Plaintiff,

v.

SAN JOSE POLICE OFFICERS' ASSOCIATION; SAN JOSE FIREFIGHTERS, I.A.F.F. LOCAL 230; MUNICIPAL EMPLOYEES' FEDERATION, AFSCME, LOCAL NO. 101; CITY ASSOCIATION OF MANAGEMENT PERSONNEL, IFPTE, LOCAL 21; THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 3; and DOES 1-10.

Defendants.

Case No. 5:12-CV-02904-LHK

PLAINTIFF'S OPPOSITION TO MOTIONS TO DISMISS

Hearing Date:	October 4, 2012
Time:	9:00 am
Courtroom:	8
Judge:	Honorable Lucy Koh
Complaint Filed:	June 5, 2012
Trial Date:	None Set

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FEDERAL CASES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is the first of six pending lawsuits seeking declaratory and other relief concerning the legality of San Jose's Measure B – "The Sustainable Retirement Benefits and Compensation Act" – enacted by San Jose's voters on June 5, 2012. This case presents federal and state constitutional issues of vital importance to the City, its residents, employees, and retirees.

In the midst of the public debate whether to place Measure B on the ballot, and during the course of related labor negotiations, the City's labor unions and City retirees claimed that the measure would violate federal and state laws protecting vested contract rights to retirement benefits. There was certainty that labor unions and retirees would sue the City and attempt to enjoin the City from implementing many of the reforms called for in Measure B. In placing the measure on the ballot, the City advised the electorate that, in light of this present, live, and explicit controversy, the City would seek declaratory relief before implementing most provisions of Measure B.

The stakes are high in the present economic climate. Measure B is expressly intended to restore and preserve essential City services that have been reduced or outright eliminated in San Jose. Sustainable funding for such services as police and fire protection, street maintenance, libraries, and community centers is at issue.

This Case Is Justiciable. For the unions now to assert that there is no "Article III justiciable controversy" and to seek dismissal is plainly wrong. Again, the unions themselves are independently pursuing declaratory relief and injunctive relief against the City in state court. It is senseless for the unions to argue now that there is no live controversy appropriate for declaratory relief, or that the case is somehow "unripe." The federal and state constitutional issues are fully joined in this case, and the Court should proceed to resolve them.

The Federal Forum Is Appropriate. Furthermore, not only is this case ripe for decision, federal court is an appropriate forum, as demonstrated by the many federal court actions brought by unions, retirees, and employees, under *both* federal and state law, for violation of their vested rights to post-retirement benefits. These federal court actions include: *Retired Employees*

Association of Orange County, Inc. v. County of Orange, No. SACV-07-1301 AG (C.D. Cal. August 13, 2012) (granting summary judgment to county where retirees sued under federal and state contracts clauses for change in method of determining premiums for retiree health benefits); *Sacramento County Retired Employees Association v. County of Sacramento*, 2012 U.S. Dist. LEXIS 45669 (E.D. Cal. March 31, 2012) (retiree association brought claims that county had violated both the federal and state contracts clauses when it reduced or eliminated retiree health insurance premium subsidies); *Sonoma County Ass'n of Retired Employees v. Sonoma County*, 2010 U.S.Dist. LEXIS 143345 (N.D. Cal. Nov. 23, 2010) (granting summary judgment to Sonoma County on, inter alia, retirees' federal contracts clause and federal due process claims challenging increase in health-care premiums); *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System*, 568 F.3d 725, 737 (9th Cir. 2009) (rejecting police union's claims that the City's imposition of last, best and final offer after the breakdown of labor negotiations violated vested contractual rights in violation of the federal contracts clause); *Robertson v. Kulongoski*, 466 F.3d 1114 (9th Cir. 2006) (rejecting current and retired public employees' federal contracts clause challenge of amendment of Oregon Public Employees Retirement System).

In fact, a law firm *involved in this federal case* filed a lawsuit on behalf of a client union *in federal court* that raises both federal and state contracts claims. In *Hanford Executive Management Employee Association v. City of Hanford,* 2012 U.S. Dist. LEXIS 23161 (E.D. Cal. Feb. 23, 2012), the union – represented by the law firm of Carroll Burdick & McDonough, which represents the POA in this case – alleged, among other claims, that the City had violated its members' rights under both the federal and California contracts clauses by requiring increased employee retirement contributions and lowering retirement benefits. Applying the standards from both federal and state case law, the federal district court held that the union had not stated facts supporting a violation of vested contractual rights, but granted leave to amend. *Id.* at *19-36.

The Unions' Abstention Theories Do Not Apply. As part of their effort to prevent this Court from resolving the constitutional issues in this case, the unions offer three Supreme Court abstention doctrines: *Younger v. Harris ("Younger"); Railroad Comm'n of Texas v. Pullman Co.* ("*Pullman*"); and *Brillhart v. Excess Ins. Co. of America* ("*Brillhart*"). The requirements for

Younger and *Pullman* are not present, prohibiting this Court from abstaining based on those doctrines. Similarly, although this Court has discretion under *Brillhart,* the *Brillhart* factors favor the Court's retention of this case.

Younger abstention does not apply because, as this Court has held in other cases, this action will not "enjoin the [state court] proceeding or have the practical effect of doing so." *Shyh-Yih Hao v. Wu-Fu Chen*, 2011 U.S. Dist LEXIS 33149 (N.D. Cal. March 16, 2011), relying on *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1148 (9th Cir. 2007). Here, the City is not seeking to enjoin a state court action or challenging the process by which the state court is adjudicating Measure B.

Pullman abstention does not apply because there is no issue of state law that if decided by a state court would obviate the necessity for adjudication of the federal claims. *Pullman* abstention is not required for interpretation of parallel state constitutional provisions, such as the unions' claims based on the California Constitution's contracts clause, takings clause, and due process protections. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 n.4 (1984); *Pue v. Sillas*, 632 F.2d 74, 80 (9th Cir. 1980). And the claims based on state laws are not uncertain for *Pullman* abstention purposes. To the extent that interpretation or construction of a new state law is based on developed and clear standards, such as is the case here, then *Pullman* does not apply. *Fireman's Fund Ins. Co. v. City of Lodi*, 2002 U.S. App. LEXIS 20999, *21 (Aug. 6, 2002), citing *Wis. v. Constantineau*, 400 U.S. 433, 439 (1971).

The only doctrine that merits serious consideration by the Court is *Brillhart abstention*, which confers discretion on courts to abstain from "gratuitous interference with the orderly and comprehensive disposition of state court litigation...." *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 495 (1942). But cases like this one, involving federal questions, are at the "outer boundaries" of the *Brillhart* doctrine. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 290 (1995). And contrary to defendants' contentions, this was not a reactive case by the City. As demonstrated above, many plaintiffs decided, independently, to bring their vested rights cases in federal court, raising both federal and state claims. It is the defendants here who are forum shopping, not the City, because they have deliberately failed to assert their federal claims.

Should this Court proceed to manage and adjudicate the City's declaratory relief complaint, it would not constitute a "gratuitous interference" with orderly state court litigation. Legitimate and important federal issues are present in this case that must be resolved, as well as state court issues. The federal forum is well suited to manage the issues and parties to ensure a fair and efficient trial court disposition; cross motions for summary judgment can easily be scheduled under court supervision.

In contrast, the unions in state court have proceeded in an uncoordinated fashion that can hardly be considered "orderly" – at least at this juncture. To date, they have refused to consolidate the cases, and are instead proceeding in piecemeal fashion, serving separate discovery, and acting independently in separate lawsuits.

Ultimately, the strongest factors in favor of the federal court assuming jurisdiction and resolving the City's declaratory relief action are that: (1) there are unquestionably federal claims at issue in this case; and (2) the federal forum is thus the only forum where all pleaded issues – both state *and* federal issues – can be resolved, efficiently and fairly, at one time. The unions cannot overcome this fundamental point. On this ground alone, the Court should deny the motions to stay or dismiss based on *Brillhart* abstention principles.

The City respectfully urges the Court to retain jurisdiction and resolve this current controversy as soon as reasonably possible.

II.
STATEMENT OF FACTS

A. BACKGROUND TO MEASURE B.

As alleged in the City's First Amended Complaint in this action ("City's Federal FAC"), the City of San Jose ("the City") is committed to providing essential City services. (City's Federal FAC, ¶2.) The City's ability to provide these essential services has been and continues to be threatened by dramatic budget cuts caused in large part by the climbing and unsustainable cost of employee benefit programs. (City's Federal FAC, ¶3.) This has only been exacerbated by the current economic crisis. (City's Federal FAC, ¶3.) In this context, the City Council voted in March 2012 to place the "Sustainable Retirement Benefits and Compensation Act," also known as

"Measure B," on the ballot for the June 5, 2012 election. (City's Federal FAC, ¶¶27, 28.)

B. SUMMARY OF MEASURE B.

Measure B is a ballot initiative intended to adjust post-employment benefits in a manner that protects the City's viability and public safety while simultaneously allowing for fair post-employment benefits for City workers. (City's Federal FAC, ¶5.) As presented to the voters, Measure B amends and modifies retirement plan features by increasing employees' contributions toward unfunded liabilities, establishing a voluntary reduced pension plan for current employees, establishing pension cost and benefit limitations for new employees, modifying disability retirement procedures, authorizing temporary suspensions of COLAs during emergencies, and requiring voter approval for increases in future pension benefits. (City's Federal FAC, ¶27.)

C. CITY COUNCIL ANTICIPATED LITIGATION.

When the City Council voted to place Measure B on the ballot, it anticipated that Measure B would face legal challenge. (City's Federal FAC, ¶9.) In fact, prior to Measure B's placement on the ballot, the City's unions and others had contended that Measure B violated both federal and state law. (See, e.g., Hartinger Decl., ¶¶13, 14, Exs. D, E.) As a result of the anticipated challenge, the Council specifically directed the City to file a declaratory relief action to determine the legality of the measure. (Id. at ¶¶4-7, Exs. A-C.)

D. THE CITY'S *FEDERAL* ACTION FOR DECLARATORY RELIEF (*FIRST-FILED* OF ALL SIX ACTIONS)

1. The Federal Action's Claims And Parties.

In keeping with the City Council's plan, on June 5, 2012, the City filed an action for declaratory relief in this federal district court. (Hartinger Decl., ¶7.) On July 3, 2012, the City filed its First Amended Complaint ("City's Federal FAC"). The City's Federal FAC seeks a declaratory judgment as to the validity of Measure B. Specifically, it seeks a declaration that Measure B does not violate: the contracts clauses of the federal or state constitution; the takings clauses of the federal and state constitutions; federal or state constitutional due process rights; the right to petition government as provided by federal and state constitutions; the separation of powers doctrine set forth by the California Constitution; the Meyers-Milias-Brown Act; the

doctrine of promissory estoppel; or the California Pension Protection Act. (City's Federal FAC, ¶31 & Prayer for Relief.)

The following five unions are parties: San Jose Police Officers' Association ("POA"); San Jose Firefighters, I.A.F.F. Local 230 ("Firefighters' Local 230"); Municipal Employees' Federation, AFSCME, Local No. 101 ("AFSCME"); City Association of Management Personnel, IFPTE, Local 21 ("IFPTE Local 21"); and International Union of Operating Engineers, Local 3 ("Operating Engineers Local 3"). (City's Federal FAC, ¶¶13-17.) The unions represent an appropriate cross-section of City employees who may be affected by Measure B.

2. The Unions' Five State-Court Actions.

On the morning of June 5, 2012, election day, the POA gave the City notice that it would appear ex parte the next morning in state court to seek a temporary restraining order against Measure B. (Hartinger Decl., ¶16, Ex. G.) On the morning of June 6, 2012, the day after the election, the POA and other unions, City employees, and retirees began filing state-court actions against the City in Santa Clara County Superior Court. (Hartinger Decl., ¶17.) As of today, August 20, 2012, five state-court actions have been filed by unions or their privies against the City. (Ibid.)

The City has filed a motion to consolidate and stay these actions – in favor of this federal action – with the motion to be heard on August 23, 2012, by the Honorable Judge Patricia Lucas of Santa Clara County Superior Court in San Jose. (Hartinger Decl., ¶30, Exs. M, N.)

(a) The Police Officers' Association's Action ("*POA* Action").

On June 6, 2012, the Police Officers' Association ("POA") filed the first state-court action against the City for declaratory and injunctive relief. (*San Jose Police Officers' Association v. City of San Jose, et al.*; Santa Clara County Superior Court Case No. 112CV225926 ("*POA* Action")). (Hartinger Decl., ¶¶29, 30.) On July 5, 2012, the POA filed a first amended complaint ("FAC"). (Id. at ¶29.) The POA's FAC alleges that Measure B violates: the California Constitution's contracts clause; the California Constitution's takings clause; the California Constitution's due process guarantee; the California freedom-of-speech/right-to-petition protection; the California Constitution's separation-of-powers doctrine; the Meyers-Milias-Brown

Act; and the California Pension Protection Act. (POA FAC, ¶¶73-96, 103-109.) The POA's FAC also alleges that Measure B constitutes a breach of contract of the POA's memorandum of understanding ("MOA") with the City. (POA FAC, ¶¶98-102.) Noticeably, the POA's FAC avoids stating any federal-law claim.

In the POA action, no discovery has been propounded, and the initial CMC is scheduled for October 16, 2012. (Hartinger Decl., ¶20.)

(b) The *Sapien* Action (Firefighters' Local 230).

Also on June 6, 2012, five active and retired San Jose firefighters filed a state-court action against the City for declaratory, injunctive, and mandamus relief entitled *Robert Sapien, et al. v. City of San Jose, et al.*; Santa Clara County Superior Court Case No. 112CV225928 ("*Sapien* Action"). (Hartinger Decl., ¶21, Ex. I (*Sapien* Complaint, ¶¶3-7).) The *Sapien* plaintiffs are or were members of San Jose Firefighters, I.A.F.F. Local 230. (Hartinger Decl., Ex. D (Declaration of Christopher Platten in Support of Firefighters' Local 230's Motion to Dismiss the City's Federal Action ["Platten Decl."], ¶1).)

The *Sapien* Action alleges that Measure B violates the California Constitution's (1) contracts clause, (2) takings clause, and (3) due process guarantee. (*Sapien* Complaint, ¶¶20-23, 28-29, 31-33, and 35-37.) Like the *POA* Action, the *Sapien* Action avoids stating any federal-law claims even though their counsel and their union have admitted that federal claims are at issue. (Hartinger Decl., ¶1, Ex. D; Answers to City's Federal FAC by Firefighters' Local 230, IFPTE Local 21, and Operating Engineers Local 3 [admitting to allegations in FAC ¶6].)

The *Sapien* plaintiffs have propounded a Request for Production of Documents (set one) and Special Interrogatories (sets one and two). (Hartinger Decl., ¶22.) The initial CMC is scheduled for October 16, 2012. (Ibid.)

(c) The *Harris* Action (Operating Engineers Local 3).

On June 15, 2012, four current or former City employees filed a state-court action against the City for declaratory, injunctive, and mandamus relief entitled *Teresa Harris, et al. v. City of San Jose, et al.*; Santa Clara County Superior Court Case No. 112CV226570 ("*Harris* Action"). (Hartinger Decl., ¶23.)

Counsel for the *Harris* plaintiffs, Wylie, McBride, Platten & Renner, are also counsel for the *Sapien* plaintiffs and three of the defendant unions in this federal action (Firefighters' Local 230, IFPTE Local 21, and Operating Engineers Local 3). (Hartinger Decl., Ex. D.) The *Harris* plaintiffs are or were members of Operating Engineers, Local 3. (Hartinger Decl., Ex. D (Platten Decl., ¶3).) On July 3, 2012, the *Harris* plaintiffs filed a First Amended Complaint ("*Harris* FAC"), dropping Plaintiff Suzann Stauffer. (Hartinger Decl., ¶24, Ex. J (*Harris* FAC, ¶¶3-6).)

Like the *Sapien* Action, the *Harris* FAC alleges that Measure B violates the California Constitution's (1) contracts clause, (2) takings clause, and (3) due process guarantee. (Harris FAC, ¶10, 26-27, 30-31, and 34-35.) Like the *POA* and *Sapien* Actions, the *Harris* FAC avoids stating any federal-law claims.

Harris has served the City with a first set of Special Interrogatories. No other discovery has yet been propounded, and the initial CMC is scheduled for October 23, 2012. (Hartinger Decl., ¶25.)

(d) The *Mukhar* Action (IFPTE Local 21).

Also on June 15, 2012, five current or former City employees filed a state-court action against the City for declaratory, injunctive, and mandamus relief entitled *John Mukhar, et al. v. City of San Jose, et al.*; Santa Clara County Superior Court Case No. 112CV226574 ("*Mukhar* Action"). (Hartinger Decl., ¶26, Ex. K (*Mukhar* Complaint, ¶¶3-7).)

Counsel for the *Mukhar* plaintiffs is Wylie, McBride, Platten & Renner (counsel for the *Sapien* and *Harris* plaintiffs and for Firefighters Local 230, IFPTE Local 21, and Operating Engineers Local 3). (Hartinger Decl., Ex. D.) The *Mukhar* plaintiffs are or were members of City Association of Management Personnel, IFPTE Local 21. (Hartinger Decl., Ex. D (Platten Decl., ¶2).)

The *Mukhar* Action is a mirror image of the Harris action, except that it names different plaintiffs. (*Mukhar* Complaint, ¶12, 28-29, 32-33, and 36-37.) Just like the *POA*, *Sapien*, and *Harris* Actions, the *Mukhar* Action avoids stating any federal-law claims.

No discovery has been propounded, and the initial CMC is scheduled for October 23, 2012. (Hartinger Decl., ¶27.)

(e) *AFSCME* Action.

On July 5, 2012, AFSCME filed a state-court action against the City for declaratory, injunctive, and mandamus relief. (*American Federation of State, County, and Municipal Employees, Local 101 v. City of San Jose, et al.*; Santa Clara County Superior Court Case No. 112CV227864 ("*AFSCME* Action").) (Hartinger Decl., ¶28, Ex. L.) The *AFSCME* Action alleges that Measure B violates: the California Constitution's contracts clause; the California Constitution's takings clause; the California Constitution's due process guarantee; the California Constitution's right-to-petition protection; the doctrine of promissory and equitable estoppel; and the California Pension Protection Act. (*AFSCME* Complaint, ¶¶121, 139, 144, 146, 157, 165, 176-181).) The *AFSCME* Action also alleges that Measure B constitutes an unconstitutional bill of attainder under the California Constitution, and an illegal ultra vires tax, fee, or assessment under the California Constitution. (*AFSCME* Complaint, ¶¶123, 129, 167-171.)

Like the other state-court actions, the *AFSCME* Action avoids stating federal-law claims. No discovery has yet been propounded, and the initial CMC is scheduled for November 13, 2012. (Hartinger Decl., ¶29.)

III. ARGUMENT

A. THE CITY'S DECLARATORY JUDGMENT ACTION MEETINGS ALL OF JUSTICIABILITY.

This case meets the standards for justiciability under the Declaratory Judgment Act. The suit raises federal issues and presents a bona-fide case or controversy ripe for adjudication. The fact that the unions have sued in state court over these same provisions of Measure B belies any arguments to the contrary.

1. DECLARATORY JUDGMENT STANDARDS.

An action for declaratory relief permits parties uncertain of their obligations to avoid incurring liability for damages by obtaining a declaratory judgment in advance of their performance. *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). Declaratory judgments also promote judicial efficiency by avoiding a multiplicity of actions between the parties. Ibid. A party seeking declaratory relief must show only: (1) an

actual controversy, (2) regarding a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998).

(a) Federal Subject Matter Jurisdiction.

In declaratory relief actions, whether the matter "arises under federal law" depends on whether the defendant could bring a federal law cause of action against the plaintiff seeking declaratory relief. "A person may seek declaratory relief in federal court if the one against whom he brings his action could have asserted his own rights there." *Standard Insurance Company v. Saklad*, 127 F.3d 1179 ,1181 (9th Cir. 1997). The Court explained, "in a sense we can reposition the parties in a declaratory relief action by asking whether we would have jurisdiction had the declaratory relief defendant been a plaintiff seeking a federal remedy." *Id.* at 1181.

This case arises under federal law – the contracts clause, due process guarantee, and takings clause of the U.S. Constitution. Before bringing suit and in papers filed in this action (including the answers of Firefighters' Local 230, IFTPE Local 21, and Operating Engineers Local 3), defendants asserted that Measure B violates federal law. They could have chosen to pursue these federal claims, in addition to the state claims they filed in their numerous state court lawsuits, but purposefully did not. In fact, many plaintiffs who claim that public employers have violated their vested rights to retirement benefits bring their claims in federal court. (*See*, *supra*, at pp. 2:24-3:14.)

Unless the federal claim is settled or released, subject matter jurisdiction is not lost by the defendant later expressly disavowing its federal claim or choosing to assert only state law rights in a state court action. *Household Bank v. JFS Group*, 320 F.3d 1249, 1259-1260 (11th Cir. 2003).

(b) Actual Controversy.

In determining whether a declaratory judgment action presents an "actual controversy," "[t]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007), quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

Here, there is no question of an actual controversy. The POA, other unions, City employees, and City retirees claimed, even before Measure B was enacted, that it violated their vested rights. As soon as the voters enacted Measure B, they sued in state court, raising the same issues concerning vested rights as raised in the City's declaratory judgment complaint. In fact, the motion to dismiss filed by AFSCME states: "MEF's members are directly affected by Measure B and its elimination of the vested right to receive the full measure of promised retirement and other post-employment benefits." (AFSCME Memo at p. 3.)

2. THE CITY'S LAWSUIT SATISFIES CONSTITUTIONAL RIPENESS REQUIREMENTS.

(a) The Filing Date Does Not Deprive This Lawsuit of Ripeness.

The POA contends that this action lacks ripeness because it was filed the day of the election, before the results were announced. The POA is wrong on the law, and none of the cases it cites support this hyper-technical proposition.

Even if there is a contingency, an "actual controversy" exists if the contingency is likely to occur. For example, declaratory relief is granted to insurers in coverage disputes with their insureds, even though the insurer's liability to indemnify the insured is contingent on its insured being held a liable third party. *Employers Ins. of Wausau v. Fox Entertainment Group, Inc.*, 522 F.3d 271, 278 (2d Cir. 2008). The focus is on "the practical likelihood that the contingencies will occur." *Ibid.* As stated in *Wausau*:

> We also reverse the district court's dismissal of Fox Entertainment and News Corp. based on lack of a justiciable case or controversy. "That the liability may be contingent does not necessarily defeat jurisdiction of a declaratory judgment action. Rather, courts should focus on the practical likelihood that the contingencies will occur[]." *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154, 177 (2d. Cir. 2001), quoting *Associated Indent. Corp. v. Fairchild Indus., Inc.*, 961 F.2d 32, 35 (2d Cir.1992) (omission in original).

Id. at 278.

Here, on the morning of the election, as the voting took place, the POA gave the City written notice that it would appear in Superior Court the following morning to seek a TRO against the implementation of Measure B. (Hartinger Decl., Ex. G.) In doing so, the POA acknowledged that Measure B was likely to be enacted, and that an actual controversy existed. The POA cannot

now claim lack of ripeness.

None of the case law cited by the POA supports its interpretation of the "ripeness" standard – that filing a declaratory relief action the day of the election requires dismissal of this case.

First, there is no absolute rule that ripeness is measured at the filing of the complaint. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), cited by the POA, relied on *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). But *Newman-Green* stated only that the existence of federal jurisdiction "ordinarily" depends on the facts at the initiation of the lawsuit, and "like most general principles, however, this one is susceptible to exceptions." *Id.*

Second, the cases cited by the POA do not support its arguments. They involve standing or mootness, and not ripeness.

In *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), the plaintiff, a state employee, had claimed that an amendment to the Arizona Constitution declaring English to be Arizona's "official language" adversely affected her employment which involved communicating in both English and Spanish. *Id.* at 50. But the Supreme Court found her claim for prospective relief to be moot because, during the litigation, plaintiff had left her state employment for a private sector position. *Id.* at 48, 72-73. Here, no party claims that this action is moot.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) held that plaintiffs, Defenders of the Wildlife and others, did not have a sufficiently concrete injury to challenge a Secretary of Interior rule that limited the reach of the Endangered Species Act. Here, there is no question that City employees allege concrete injury.

Renne v. Geary, 501 U.S. 312 (1991), involved a challenge to Article II, section 6(b) of the California Constitution, which prohibited political parties from endorsing candidates for nonpartisan offices. The Court held that the parties seeking relief, individual voters and local political party committee members, lacked standing to assert the rights of political parties and others, and in any event there was no record of "an actual or imminent application" of section 6(b). *Id.* at 319-323. As stated above, here, the voters have enacted Measure B and there is no question that City employees allege concrete injury from its provisions.

In *Sierra Club v. Dombeck*, 161 F.Supp.2d 1052 (D. Ariz. 2001), the Forest Service contended that the case should be dismissed because the Forest Service had decided to conduct further environmental analysis of the water delivery system at issue in the litigation. *Id.* at 1061-62. The Court held that the case was not moot, based on the stringent standard that subsequent events must make "it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 1062 (quotation omitted). Here, there is no question of mootness; the City intends to implement Measure B as adopted by the voters.

Finally, not only is the POA's argument legally unsupported, it makes no practical sense. Even if the POA were correct, the City could simply refile its lawsuit, as the election was held and the voters enacted Measure B.

(b) This Is Not a Case Where Further Action Must Be Taken Before the Law May Be Implemented.

The POA also argues that this case is not ripe because it requires implementing ordinances. Neither the facts nor the law support this argument. In fact, the POA and other defendants have placed Measure B, as it was enacted, at issue in the state cases they have filed.

First, the First Amended Complaint's description of the provisions of Measure B at issue makes it clear that, with a few exceptions, they do not require further action. The provisions of Measure B at issue include provisions that:

- Require employees to pay higher retirement contribution rates, or to opt into a lower cost plan (1506-A);
- In the absence of a new plan still require the payment of higher contribution rates (1507-A);
- Change the definition of disability retirement (1509-A);
- Discontinue supplemental payments to retirees (1511-A); and
- Require employees to make greater contributions to retiree healthcare (1512-A).

(City's Federal FAC, ¶29.)

"A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Stormans, Inc. v. Selecky*, 586 F.3d 1109,

1126 (9th Cir. 2009). In *Selecky*, the plaintiffs' employer had stated an intent to enforce new state rules requiring employees to fill prescriptions for the "morning after pill" in spite of religious objection. The Ninth Circuit found that the employees' declaratory relief action satisfied both Article III and prudential ripeness requirements. *Id.* at 1124-26. The Court explained:

> We consider whether the administrative action is a definitive statement of an agency's position; whether the action has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms.

Id. at 1126 (quotations and citation omitted). These factors were satisfied in *Selecky* even though "the new rules may undergo some amendment or agency construction," because they currently had the force of law. *Ibid.*

Here, the *Selecky* factors are more than satisfied. The voters have spoken. Measure B is final, does not require further factual development and the issues raised are primarily legal. And Measure B will have a direct and immediate effect on the City's employees and retirees. The City has only agreed to delay implementation in order to give the parties an opportunity to litigate their legality.

There are two provisions of Measure B that the City has included in this lawsuit because the POA and others challenge them on their face, but which are not immediately operative. Section 1510-A authorizes the City Council to reduce retiree COLAs in the event of a "fiscal and service level emergency." Section 1514-A requires that, in the event a court determines that the City cannot impose higher contribution rates, the City must obtain equivalent savings through salary reductions. These provisions will be become operative in the event of an emergency, or a court's ruling, respectively. But the POA and other defendants have challenged these provisions as illegal on their face in state court, and cannot have it both ways. Unless the POA and other defendants agree to refrain from challenging these provisions, they should remain in this lawsuit.[1]

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[1] The POA incorrectly contends that the City's Federal FAC "specifically pleads that Measure B requires implementing ordinances" and cites to paragraphs 9, 10, 29(G), 33 and 34. (POA Memo at 5.) That is simply not true. Paragraph 9 states only that the City delayed "implementation of (footnote continued)

Second, the case law cited by the POA is clearly distinguishable. In *Texas v. United States*, 523 U.S. 296, 300-301 (1998), the Supreme Court held that adjudication of the legality of Texas statutes under the Voting Rights Act was premature because implementation was contingent on events – appointment of a master or management team to oversee a school district governed by an elected board – that had not occurred. Here, as explained above, most of Measure B is effective without regard to other events.

The POA simply misquotes *Schreiber Distribution Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986), which does not stand for the proposition that an amended complaint cannot cure a deficiency in the original complaint. *Schreiber* stated the opposite: "Because the district court did not determine, nor can we conclude, that the allegation of other facts could not possibly cure the deficiencies in Schreiber's complaint, the district court *abused its discretion in dismissing* the RICO counts with prejudice." Ibid. (emphasis added). Moreover, as explained in the prior section, *Lujan* and *Sierra Club*, cited again in this section by the POA, do not support the POA's contention of lack of ripeness because they involve standing and mootness, not ripeness, and are factually distinguishable.

(c) The City Does Not Seek an "Advisory Opinion."

The City does not seek an advisory opinion. As stated above, the Complaint specifically lists the provisions of Measure B that defendants claim are illegal. Measure B will have a concrete effect on City employees by impacting their compensation and changing eligibility criteria for certain retirement benefits. Having raised these same issues in state court actions, the POA and other defendants cannot claim here that the City seeks an advisory opinion.

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increased pension contributions" until 2013, to permit adjudication of their legality. Paragraph 10 states only that "to implement Measure B *in its entirety*" the City must develop administrative procedures and implementing ordinances. Paragraph 29(G) only describes the "actuarial soundness" requirement of Measure B. Paragraph 29(I) states only that Measure B supersedes inconsistent City laws to the contrary and accordingly calls "for ordinances to implement Measure B's provisions." Paragraph 33 states only that employees "*will begin* paying the increased contribution rate as of June 23, 2013." Paragraph 34 asks only that the Court adjudicate the legality of Measure B.

Once again, the cases cited by the POA are clearly distinguishable, and in fact demonstrate that the City is not seeking an advisory opinion. In the cases cited by the POA, the courts refused to entertain lawsuits because their application was speculative. Here the issues are not "speculative."

In *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947), the Court dismissed a challenge to the Hatch Act as seeking an advisory opinion because the Court refused to "speculate as to the kinds of political activity the appellants desire to engage in." *Id.* at 90. Here, in contrast, there is no speculation as to the provisions of Measure B and how they will financially impact City employees. In *Hillblom v. U.S.* 896 F.2d 426 (9th Cir. 1990), the plaintiff did not identify any particular statute involved, but only "potential future acts" that might impact the plaintiff. *Id.* at 430. Here, again, there is a particular measure involved – Measure B – and it is clear how it impacts City employees. In *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937), the Court in fact found an actual controversy, stating that: "The dispute relates to legal rights and obligations arising from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract." *Id.* at 242. Similarly, here the dispute is "definite and concrete" – City employees will have their compensation and eligibility for certain benefits changed.

Other cases cited by the POA also do not aid its cause. In *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945), the Court refused to pass on the validity of a state statue when it was unclear whether the statute would be applied to plaintiffs. *Id.* at 460. In *Alameda Conservation Assoc. v. California*, 437 F.2d 1087 (9th Cir. 1971), the court refused to rule on the legality of an anticipated quiet title action that had not yet materialized. *Id.* at 1093. *Dixie Electric Cooperative v. Citizens of Alabama*, 789 F.2d 852 (11th Cir. 1986), involved an attempt through a validation action to adjudicate issues that had not yet arisen. *Id.* at 858. In *Villas at Parkside Partners v. City of Farmers Branch*, 577 F.Supp. 2d 880 (N.D. Tex. 2008), the Court had already enjoined a City ordinance, and the City had made five different attempts to offer hypothetical alternatives for the Court's approval. *Id.* at 885. Here, in contrast to the above cases, the voters have enacted Measure B, it has concrete effects on City employee compensation and benefits, and the POA and other defendants have asserted its illegality. There is nothing

hypothetical about this litigation.

Finally, in *Waialua Agr. Co. v. Maneja*, 178 F.2d 603 (9th Cir. 1949), cited by the POA, the Court rejected a lawsuit brought by agreement between the union and plantation owners over employee overtime because no specific facts were alleged about individual employees. *Id.* at 613. Here, there is no deal between the unions and the City to frame this lawsuit. And, as stated above, the impacts of Measure B on City employees are obvious.

(d) The POA's Argument On Standing Is Legally Incorrect; In A Declaratory Relief Action, The Plaintiff Need Only Show An Actual Case And Controversy.

The POA misapprehends the law on standing. Under the Declaratory Judgment Act, the City need demonstrate only the existence of an actual controversy between the parties. A case or controversy exists here because Measure B would directly affect City employee compensation and benefits.

In a declaratory relief action, the question is whether the defendant will be injured. As explained by the Ninth Circuit in connection with federal jurisdiction: "A person may seek declaratory relief in federal court if the one against whom he brings his action could have asserted his own rights there." *Standard Insurance Company v. Saklad*, 127 F.3d 1179, 1181 (9th Cir. 1997). The court stated, "in a sense we can reposition the parties in a declaratory relief action by asking whether we would have jurisdiction had the declaratory relief defendant been a plaintiff seeking a federal remedy." *Id.* at 1181. Similarly, as explained by the United States Supreme Court in describing a "case or controversy:" "It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case." *Maryland Casualty Co. v. Pacific Coal & Oil*, 312 U. S. 270, 273 (1941). Applying those principles here, the issue is whether the City employees and retirees could be plaintiffs seeking a federal remedy. The answer is clearly yes. They would have standing in federal court because they can allege the requisite injury – Measure B would affect their compensation and benefits.

Moreover, the POA's argument on standing ignores the very purpose of declaratory relief. An action for declaratory relief permits parties uncertain of their obligations to avoid incurring

liability for damages by obtaining a declaratory judgment in advance of their performance. *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The City is entitled to bring a declaratory relief action in order to obtain a legal ruling in advance of any potential injury to its employees that would give rise to damages.

The question here is whether the defendants can allege injury, not the City. The defendants clearly can allege injury – under Measure B their compensation will be reduced and benefits affected. And defendants have asserted the illegality of Measure B. These factors create the required case or controversy for a declaratory relief action. Under the Declaratory Relief Act, the City is entitled to an adjudication in advance of committing any injury.

B. DEFENDANTS HAVE NOT DEMONSTRATED ANY BASIS FOR THIS COURT TO ABSTAIN FROM DECIDING THIS CASE.

The Court should reject defendants request that it abstain under *Younger*, *Pullman,* and *Brillhart.* First, this case does not satisfy the requirements of *Younger* and *Pullman,* and thus this court has no authority to abstain under those doctrines. Second, although the Court does have discretion to abstain under *Brillhart*, this case does not meet the criteria for abstention.

1. *YOUNGER* ABSTENTION DOES NOT APPLY BECAUSE THE CITY'S FEDERAL ACTION WILL NOT ENJOIN THE STATE-COURT ACTIONS OR HAVE THE EFFECT OF DOING SO.

Firefighters' Local 230 and the POA argue that the Court should dismiss or stay the City's Federal Action under the *Younger* abstention doctrine.[2] This argument must be rejected because this action does not satisfy the fourth *Younger* test: that the federal action will enjoin the state-court action or have the effect of doing so. *Shyh-Yih Hao v. Wu-Fu Chen* , 2011 U.S. Dist. LEXIS 33149, *39-40 (N.D. Cal. March 16, 2011). As a result, it would be error for the Court to abstain under *Younger*.

[2] AFSCME does not refer to *Younger* abstention in its memorandum.

(a) *Younger* Abstention Does Not Apply Unless The Federal Action Will Enjoin The State-Court Action Or Have The Effect Of Doing So.

Younger abstention is proper only when all four of its requirements are "strictly met." *Shyh-Yih Hao v. Wu-Fu Chen, supra*, 2011 U.S. Dist. LEXIS 33149 at *37, citing *AmerisourceBergen Corp. v. Roden*, 495 F.3d. 1143, 1148 (9th Cir. 2007). The fourth *Younger* factor requires that:

> [T]he federal court action [subject to the *Younger* motion] would "enjoin the [state-court] proceeding or have the practical effect of doing so, i.e., would interfere with the state proceeding in a way that *Younger* disapproves."

Shyh-Yih Hao v. Wu-Fu Chen, supra, 2011 U.S. Dist. LEXIS 33149 at *37, quoting *San Jose Silicon Valley Chamber of Commerce Political Action Committee v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008). If this one factor is not met, the Court need not even consider the other factors. This Court has stated:

> The Ninth Circuit has emphasized that "abstention is only appropriate in the narrow category of circumstances in which the federal court action would actually 'enjoin the [ongoing state] proceeding, or have the practical effect of doing so.'" *AmerisourceBergen,* 495 F.3d at 1151. This occurs, for instance, when a federal court's finding that a state statute or regulatory scheme is unconstitutional would effectively enjoin enforcement of that statute in ongoing state court proceedings. *See Gilbertson v. Albright,* 381 F.3d 965, 982 (9th Cir. 2004). In contrast, "the Supreme Court has rejected the notion that federal courts should abstain whenever a suit involves claims or issues simultaneously being litigated in state court merely because whichever court rules first will, via the doctrines of res judicata and collateral estoppel, preclude the other from deciding that claim or issue." *AmerisourceBergen,* 495 F.3d at 1151.

Shyh-Yih Hao v. Wu-Fu Chen, supra, 2011 U.S. Dist. LEXIS 33149 at *39-40.

In its motion, the POA refers only to *Younger's* "three tests" (POA Memo at p. 17:12). *See AmerisourceBergen, supra*, 495 F.3d at 1149 (holding that it is "incorrect" to evaluate only the three threshold *Younger* factors without reaching the "vital and indispensable fourth element"). Similarly, Firefighters' Local 230 does not address this fourth *Younger* factor – rather, it cites *Gilbertson, supra*, generally for the notion that *Younger* applies so long as the federal action has a "preclusive" effect. (Firefighters' Memo at p. 7:23-24.) It is not surprising why the unions avoid this fourth factor: it is fatal to their argument.

(b) The City's Federal Action Will Not Enjoin the State-Court Actions or Have the Effect of Doing So.

Here, the City's Federal Action will not enjoin the state-court actions or have the effect of doing so. First, the City's action will not enjoin the state-court actions; the City is seeking only declaratory – not injunctive – relief.

Second, the City's declaratory relief action will not have the effect of enjoining the state-court actions. "This occurs, for instance, when a federal court's finding that a state statute or regulatory scheme is unconstitutional would effectively enjoin enforcement of that statute in ongoing state court proceedings." *Shyh-Yih Hao v. Wu-Fu Chen*, supra, 2011 U.S. Dist. LEXIS 33149 at *37, citing *Gilbertson v. Albright, supra,* 381 F.3d at 982. That is not this case.

Here, any ruling by this Court on the legality of Measure B would not have the effect of enjoining the state court actions that address Measure B. Both the federal and state court actions seek a declaration regarding the validity of Measure B. Unless the state court choses to impoase a stay, the state-court action would be free to proceed. As explained by this Court:

> [T]he state court will be "free to continue simultaneously with the federal suit," [*AmerisourceBergen*, 495 F.3d] *at 1152*, and if federal court resolves [plaintiff's] claims first, the state court will simply apply principles to issue preclusion to determine the effect, if any, of that ruling on the relevant issues in the dissolution proceeding. *See id.* (finding that potential application of collateral estoppel arising from concurrent state and federal proceedings does not justify abstention under *Younger*). Under such circumstances, concurrent jurisdiction over potentially related issues is entirely proper, and it would be error for this Court to abstain pursuant to *Younger*.

Shyh-Yih Hao v. Wu-Fu Chen, supra, 2011 U.S. Dist. LEXIS 33149 at *37, citing *Gilbertson v. Albright, supra,* 381 F.3d at 982.

The Ninth Circuit discussed this fourth factor of the *Younger* test in *Potrero Hills Landfill, Inc v. County of Solano*, 657 F.3d 876 (9th Cir. 2011), in which the Court of Appeals stated that *Younger* abstention applies only when the federal plaintiffs bring "challenges to the very processes" by which states render and compel compliance with their judgments. *Id.* at 886-87. In *Potrero Hill*, there was a parallel writ proceeding in state court, but the Court found no basis for *Younger* abstention because the federal plaintiffs did not challenge "the authority of state courts to

issue such writs nor processes for their enforcement once issued . . . ." *Id.* at 887.

In this case, the City is not challenging the process by which the state courts are adjudicating Measure B, or seeking any relief that would effectively enjoin the state-court proceedings. The pendency of a related action in state court is insufficient for *Younger* abstention. As explained in *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989): "It is true, of course, that the federal court's disposition of such a case may well affect, or for practical purposes preempt, a future – or as in the present circumstances, even a pending – state-court action. But there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *Id.* at 373.

In conclusion, the Court cannot dismiss or stay the City's federal action under *Younger*. The fourth factor is not met, and *Younger* abstention is unavailable. *AmerisourceBergen, supra*, 495 F.3d at 1148 ("*balancing* the *Younger* elements, rather than determining whether each element, on its own, is satisfied, conflicts with the requirement that federal courts abstain only in those cases falling within the 'carefully defined' boundaries of federal abstention doctrines" [citation omitted]).

2. *PULLMAN* ABSTENTION DOES NOT APPLY TO THIS CASE, AND – EVEN IF IT DID – CERTIFICATION OF STATE-LAW QUESTIONS IS FAVORED OVER ABSTENTION.

In its motion to dismiss, the POA argues that the Court should stay this case under *Pullman* because "no California state court has yet decided the legality of Measure B." (POA Memo at p. 19:17-19.) AFSCME reiterates this point and adopts the POA's arguments. (AFSCME Memo at p. 10:10-11:2 & n.3.) The Firefighters do not even try to argue for *Pullman* abstention.

As discussed below, the Court should not – indeed cannot – abstain under *Pullman*. First, the doctrine does not apply because there is no question that two of its three mandatory factors are not present: (1) a ruling on the state-law issues will not obviate the need for federal adjudication; and (2) to the extent state-law issues must be resolved, the governing state precedents are clear and well established.

Second, even if *Pullman* did apply, the Supreme Court and the Ninth Circuit favor certification of state-law questions to the California Supreme Court over *Pullman* abstention.

Therefore, the Court should reject the unions' request for *Pullman* abstention.

(a) *Pullman* Abstention Does Not Apply.

(i) Summary of *Pullman* Abstention.

Pullman abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy that is properly before it." *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003) (reversing a stay under *Pullman* of a federal First Amendment action) (internal quotation and citation omitted).

In order to "give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims," *Pullman* abstention should rarely be applied. *Porter, supra,* 319 F.3d at 492, quoting *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

Three criteria that must be present before *Pullman* abstention is permissible:

1. The complaint must involve a sensitive area of social policy that is best left to the state to address.
2. A definitive ruling on the state issues by a state court could obviate the need for [federal] constitutional adjudication by the federal court; and
3. The proper resolution of the potentially determinative state law issues is uncertain.

Fireman's Fund Ins. Co. v. City of Lodi, 2002 U.S. App. LEXIS 20999, *18 (9th Cir., Aug. 6, 2002) (holding, in part, that district court erred in abstaining under *Pullman* from deciding whether municipal ordinance was preempted by state law when state-law preemption analysis resembled the federal-law preemption analysis), cert. denied by *City of Lodi v. Fireman's Fund Ins. Co.*, 2003 U.S. LEXIS 2743 (U.S. 2003). "[T]he absence of any one of these three factors is sufficient to prevent the application of *Pullman* abstention." *Porter v. Jones*, *supra*, 319 F.3d at 492. In fact, "[a]bstaining under *Pullman* constitutes an abuse of discretion when the requirements for *Pullman* abstention are not met." *Id.* at 491.

Finally, dismissal is never appropriate under *Pullman* abstention; the Court must retain jurisdiction to later adjudicate a plaintiff's federal claims. *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 802 (9th Cir. 2001).

As discussed below, at the very least, two of the three *Pullman* factors are not present in this case. As a result, the Court has no discretion to consider *Pullman* abstention, and the unions' request for a *Pullman* stay must be denied.

(ii) The Case Does Not Satisfy the Second *Pullman* Factor: A Definitive Ruling by a California Court Would Not Obviate the Need for Federal Constitutional Adjudication by This Court.

The second *Pullman* factor is not present, and thus the Court cannot stay this case based on *Pullman*. *Porter v. Jones*, *supra*, 319 F.3d at 492. This factor requires that a definitive ruling on the state issues by a state court obviate the need for federal constitutional adjudication by the federal court. *Fireman's Fund Ins. Co. v. City of Lodi*, *supra*, 2002 U.S. App. LEXIS 20999 at *18.

In their motions, defendants argue that a ruling in state court that Measure B violates the California Constitution will obviate the need for this Court to adjudicate Measure B's validity under the U.S. Constitution. (POA Memo at p. 20:12-17, citing *Smelt v. County of Orange*, 447 F.3d 673, 681 (9th Cir. 2006).) This reasoning has been rejected by the United States Supreme Court when the state-court actions involve claims based on state constitutional provisions that are parallel to their federal counterparts.

In *Hawaii Housing Authority v. Midkiff*, the Court held that *Pullman* abstention is not required when state constitutional provisions at issue mirror the federal constitution. *HAA v. Midkiff*, 467 U.S. 229, 237 n.4 (1984) ("[*Pullman*] abstention is not required for interpretation of parallel state constitutional provisions"); compare *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 806 (9th Cir. 2001) (holding that *Pullman* abstention was appropriate because Washington State Constitutional prohibition of unreasonable searches "significantly differs" from the U.S. Constitution's Fourth Amendment).

The reason behind this mirror-image rule is clear:

> Since most states have both some form of due process clause..., abstention would be necessary, or at least within the power of the district judge, in nearly every civil rights action. Consequently, litigants' access to a federal forum would be significantly delayed. That could endanger the very effectiveness of the civil rights jurisdiction.

Stephens v. Tielsh, 502 F.2d 1360, 1362 (9th Cir. 1974); *Pue v. Sillas*, 632 F.2d 74, 80 (9th Cir. 1980) (holding that *Pullman* abstention was an abuse of discretion when federal plaintiff raised due process challenge under both California and U.S. due process protections).

Here, the City has raised claims based on the U.S. Constitution's (1) Contracts Clause, (2) Takings Clause of the Fifth Amendment, and (3) due process protections in the Fifth and Fourteenth Amendments. (City's Federal FAC, ¶31.) In state court, the unions have raised challenges to Measure B based on the California Constitutional equivalents. Critically, these state and federal provisions mirror each other. *Retired Emps. Ass'n of Orange County v. County of Orange*, 610 F.3d 1099, 1102 (9th Cir. 2010) ("Courts apply the same analysis to claims brought under the Contracts Clause of the United States Constitution and the California Constitution."); *Pue v. Sillas*, *supra*, 632 F.2d at 81 (holding that due process protections of California Constitution mirror those of the U.S. Constitution); *Plumleigh v. City of Santa Ana*, 2010 U.S. Dist. LEXIS 131343, *8-9 (C.D. Cal., Dec. 8, 2010) ("California courts generally construe takings under the California Constitution congruently to takings under the Fifth Amendment"), citing *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643, 664 (2002).

Thus, because the California and U.S. Constitutional provisions at issue in the Measure B litigation are parallel, *Pullman* abstention is not appropriate. *HAA v. Midkiff*, *supra*, 467 U.S. at 237 n.4; *Pue v. Sillas*, *supra*, 632 F.2d at 81 ("the existence of a mirror-image state constitutional issue does not implicate the policies which justify abstention").

Finally, should unions might argue that, even if the constitutional provisions are parallel provisions, the federal court must still analyze state law to adjudicate the federal claims, they would be mistaken. Such an argument would overstates the role of state law. Federal courts apply *federal law* in deciding whether the federal contracts clause has been violated, and are not bound by the decisions of state courts on this federal issue.

In *Appleby v.* City *of New York*, 271 U.S. 364 (1926), the United States Supreme Court explained, in reversing New York's highest court based on the federal contracts clause: "Ordinarily this Court must receive from the court of last resort of a State its statement of state law as final and conclusive, but the rule is different in a case like this." *Id.* at p. 380. This principle

has been followed without exception in federal contracts clause cases.

> "When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court." *Irving Trust v. Day*, 314 U.S. 556, 561 (1942).

"The question whether a contract was made is a federal question for purposes of Contract Clause analysis (citation omitted) and "whether it turns on issues of general or purely local law, we cannot surrender the duty to exercise our own judgment." *General Motors v. Romein*, 503 U.S. 181, 187 (1992).

"Although federal courts look to state law to determine the existence of a contract, federal rather than state law controls as to whether state or local statutes or ordinances create contractual rights protected by the Contracts Clause." *San Diego Police v. San Diego Retirement System*, 568 F.3d 725, 737 (9th Cir. 2009).

As a result, litigation of state claims in state court will not obviate the federal questions, and the second *Pullman* factor is not satisfied.

(iii) This Case Fails to Satisfy the Third *Pullman* Factor: State Law Is Not "Uncertain" or "Novel" for *Pullman* Purposes.

To satisfy the third factor, the Court must find that "the proper resolution of the potentially determinative state law issue is uncertain." *Fireman's Fund Ins. Co. v. City of Lodi*, supra, 2002 U.S. App. LEXIS 20999, *18. Here, however, the Court is not faced with a law that is "uncertain" for purposes of analysis under *Pullman*.

Critically, "[t]he fact that a state court has not ruled on the precise issue at stake in this case does not mean that the proper resolution of the state law issue is "uncertain." *Fireman's Fund Ins. Co. v. City of Lodi, supra*, 2002 U.S. App. LEXIS 20999 at *18, citing *Wis. v. Constantineau*, 400 U.S. 433, 439 (1971). In contending that Measure B presents novel issues of state law, AFSCME ignores this point and fails to identify any necessary construction or interpretation of Measure B.

This is not a case, like those cited by AFSCME, where the state statute is claimed to be unduly vague, meaning a state court interpretation may resolve the vagueness issue, and eliminate the need to litigate the federal question. *See Albertson v.Millard*, 345 U.S. 242 (1953) (AFSCME Memo at p. 6). Nor is it a case like *Quong Ham Wah Co. v. Industrial Acc. Commission of California*, 255 U.S. 445, 448 (1921), where the state statute was claimed to be discriminatory, and the California Supreme Court's interpretation eliminated the discriminatory feature. (AFSCME Memo at p. 7.)

If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction. *Harman v. Forssensuis*, 380 U.S. 528 (1964); *see also Babbit v. United Farm Workers Nat. Union* 442 U.S. 51 (1979).

Second, this is a case that will be decided by the application of well-developed law on vested rights, that is similar under both the state and federal contracts clauses. The law in this area is very fact specific, must be applied on a case by case basis, with the results turning on the legislative intent in granting a particular retirement benefit.

As recently confirmed by the California Supreme Court, "we conclude generally that legislation in California may be said to create contractual rights when the statutory language or circumstances accompanying its passage 'clearly . . . evince a legislative intent to create private rights of a contractual nature enforceable against the [government body]." *REAOC v. County of Orange*, 52 Cal.4th 1171, 1187 (2011), quoting *Valdez v. Cory*, 139 Cal.App.3d 773, 786 (1983), quoting *United States Trust v. New Jersey*, 431 U.S. 1, 17, fn. 14. (1977). Federal law similarly requires "clear and unmistakable" evidence that a governmental entity "intends to bind itself contractually." *San Diego POA v. San Diego City Employees Retirement System*, 568 F.3d 725, 737 (9th Cir. 2009).

Third, contrary to AFSCME's assertions, this is not the only case pending in California concerning the issue of public employees vested rights to post-retirement benefits. Many cases are pending in both state *and federal* courts. Many plaintiffs – unions and retirees – have chosen to

sue in federal court. In fact, as discussed in the Introduction, a recent case was brought in federal court, on behalf of a union, by a law firm that represents a plaintiff in this case. See *Hanford Executive Management Employee Association*, *supra*, 2012 U.S. Dist. LEXIS 23161 (E.D. Cal. Feb. 23, 2012).

(b) Even If *Pullman* Applies, Certification To The California Supreme Court Is Favored Over *Pullman* Abstention.

Even if *Pullman* abstention applies, this Court should retain jurisdiction because the U.S. Supreme Court disfavors abstention where states such as California permit certification of state-law questions to the state supreme court. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75-77 (1997) ("[c]ertification today covers territory once dominated by a deferral device called "*Pullman* abstention"...).

In *Arizonans*, the Supreme Court criticized the lower courts for refusing the Arizona Attorney General's repeated requests for certification of state-law questions to the Arizona Supreme Court. *Arizonans*, *supra*, 520 U.S. at 76-77 (issue concerned Arizona constitutional provision requiring that the state act only in the English language). In so doing, the Court held that certification was a more efficient method of addressing novel state-law questions than *Pullman* abstention. *Ibid.*

Certification procedure, in contrast [to *Pullman* abstention], allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response. *Arizonans*, *supra*, 520 U.S. at 76 (citations omitted).

California law permits certification to the California Supreme Court by the Ninth Circuit. Cal. Rules of Court, rule 8.548. In *Los Angeles Alliance for Survival*, the California Supreme Court held that "[m]any commentators have noted the benefits of certification." *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal. 4th 352, 360 (2000) (first instance of California Supreme Court accepting certified question from the Ninth Circuit).

In its motion to dismiss, AFSCME seeks to cast certification as an improper, disfavored process. (AFSCME Memo at p. 2:6-7, referring to certification as adding "inefficiency"). This

view of certification has been rejected by both the U.S. Supreme Court and the Ninth Circuit. *Arizonans*, *supra*, 520 U.S. at 76. In fact, the litigation associated with *Retired Employees Ass'n of Orange County Inc. v. County of Orange*, 610 F.3d 1099 (9th Cir. 2010), is an example of the certification process working as it should.

The certification process *exists* to address AFSCME's concern that, "[b]ecause, as contended by the City, the issues raised by the parties are novel and/or raise question undecided by state law, any decision rendered by this court of the Ninth Circuit Court of Appeals will have no precedential value with respect to such issues of state law." (AFSCME Memo at p. 1:14-17).

In conclusion, *Pullman* abstention is inapplicable because the three mandatory *Pullman* factors cannot be satisfied. The Court is not presented with a novel application of state law whose resolution is uncertain for *Pullman* purposes. Moreover, if the Court were to conclude otherwise, the Court should pursue the certification process instead of abstention. In light of *Arizonans* and its progeny, certification is favored over abstention.

3. THE COURT SHOULD RETAIN JURISDICTION OF THIS CASE BECAUSE THE *BRILLHART* PRINCIPLES WOULD BE FURTHERED BY FEDERAL ADJUDICATION.

The unions argue that the Court should dismiss or stay the City's action under *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942) and its progeny. (POA at pp. 14:20-17:9; Firefighters at pp. 6:9-8:4; AFSCME at p. 10:2-9.) In so arguing, the unions discuss *Brillhart* abstention generally, without acknowledging that the City's federal action bears no factual resemblance to the typical *Brillhart* abstention case.

The vast majority of *Brillhart* cases involve an insurance company that has filed a declaratory action in federal court raising only state-law claims and predicated on diversity jurisdiction. That scenario has no application to the City's federal action.

Here, the City raises federal claims – claims that the unions have refused to raise in state court even while admitting that such claims must be adjudicated. As such, it is the unions who engage in forum shopping by filing multiple, uncoordinated actions in state court that omit critical claims. Thus, to further the principles articulated in *Brillhart*, this Court should exercise – not decline – jurisdiction.

(a) Summary of *Brillhart* Abstention.

Under the Declaratory Judgment Act, the Court's jurisdiction is permissive. 28 U.S.C. § 2201. In determining whether to retain jurisdiction, district courts consider three factors identified in *Brillhart*. *Brillhart, supra,* 316 U.S. at 494-96; *Government Employees Ins. Co. ("GEICO") v. Dizol*, 113 F.3d 1220, 1225 (9th Cir. 1998). Specifically, district courts consider whether abstention will:

1. Avoid needless determination of state law issues;
2. Discourage litigants from filing declaratory actions as a means of forum shopping;
3. Avoid duplicative litigation.

Dizol, supra, 113 F.3d at 1225.

The Ninth Circuit has identified several additional factors that should be considered by courts conducting a *Brillhart* analysis including: whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a 'res judicata' advantage; and whether the use of a declaratory action will result in entanglement between the federal and state court systems. *Dizol,* 113 F.3d 1220, 1225 n.5, citing *Kearns*, 15 F.3d at 145 (J. Garth, concurring).

(b) The *Brillhart* Factors Weigh in Favor of this Court Retaining Jurisdiction.

(i) Federal-Law Claims Are At Issue in the City's Action.

The Court should retain jurisdiction over this case because the City raises *federal claims*, a fact that is not present in the vast majority of *Brillhart* abstention cases.

In *Wilton v. Seven Falls Co.* where the Supreme Court applied *Brillhart* to declaratory relief actions, the plaintiff had not raised federal claims and had instead based its case on diversity jurisdiction. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 219 (1995). The Court specifically noted that: "We do not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example, *cases raising issues of federal law* or cases in which there are no federal

parallel state proceedings." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 290 (1995) (emphasis added).[3] Courts have since indicated that the presence of federal claims must always be a major consideration weighing against surrender of federal jurisdiction. *Verizon v. Inverizon*, 295 F.3d 870, 873 (8th Cir. 2002), citing *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 26 (1983).

Here, the City seeks declaratory relief on several federal constitutional claims. Specifically, the City seeks a declaration that Measure B does not violate the U.S. Constitution's Contracts Clause, Fifth Amendment, and Fourteenth Amendments. Unions previously informed the City that Measure B would violate federal law, and several union defendants have admitted in this action that such federal claims should be adjudicated. As a result, the case is immediately distinguishable from the state-law insurance actions for which *Brillhart* abstention was designed.

The facts here are similar to those in *Verizon v. Inverizon*, 295 F.3d 870 (8th Cir. 2002). There, the Eighth Circuit reversed a stay under *Brillhart*, holding that the district court did not give proper weight to the presence of federal-law issues. *Id.* at 873. In *Verizon*, a company (Inverizon) that provided agriculture and business consulting services sent a cease and desist letter to the communications company Verizon. *Verizon*, *supra*, 295 F.3d at 871. Inverizon alleged that that the "Verizon" mark was likely to cause confusion with Inverizon's mark and therefore violated the federal Lanham Act. *Ibid.*

When Inverizon did not respond to Verizon's request for further information, Verizon filed a federal declaratory relief act in the U.S. District Court of Missouri seeking a declaration of rights under the federal Lanham Act and various state statutes. *Id.* at 872. Six weeks later, Inverizon filed a Missouri state court action "expressly denying that it was seeking any relief under federal

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[3] *Brillhart* also concerned a case based on diversity jurisdiction. *Brillhart, supra,* 316 U.S. at 493.

> Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, *not governed by federal law*, between the parties.

Brillhart, supra, 316 U.S. at 495 (emphasis added).

law." *Ibid.* Inverizon then filed in federal court a motion to stay the federal action, and the district court granted a stay. *Ibid.*

On appeal, the Eighth Circuit held that the stay was an abuse of discretion. *Id.* at 871. The Court's holding rested predominantly on the district court's failure to acknowledge the presence of federal claims in Verizon's federal declaratory action:

> However, the district court failed to mention one very significant factor present in this case that simply was not at issue in either *Brillhart* or *Wilton*-that is, the presence of a federal question that is not present in the state court action." Cf. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 26 (indicating that "the presence of federal-law issues must always be a major consideration weighing against surrender" of federal jurisdiction).

Verizon, *supra*, 295 F.3d at 873.

The court noted that, "[c]ontrary to the district court's finding, the record reveals that the two actions do not involve the same issues because the state court action specifically states that it 'pleads no federal cause of action.'" *Id.* at 873. Inverizon, however, had earlier raised federal claims in its cease and desist letter to *Verizon*. *Id.* at 874. The same could be said about this case. The unions here reiterate throughout their briefs that they do not raise federal claims in their state law actions.

In reversing the stay in *Verizon*, the Eighth Circuit held that, "Inverizon can hardly complain that it was deprived of its choice of forum when it explicitly chose not to raise a federal Lanham Act claim in its state petition. *Id.* at 875. Again, the same could be said about this case.

This case – unlike the traditional *Brillhart* case – involves federal questions, questions that the unions admit need adjudication but which they refused to plead in their state-court actions. As a result, the presence of these federal claims is a major consideration weighing against a stay.

(ii) The Unions Are the Forum Shoppers Here – Not the City.

The Court should retain jurisdiction here because abstention will have the opposite effect intended by a *Brillhart* stay – it will encourage forum shopping.

The unions' accusations of "forum shopping" – and their objections to the federal forum – are unsupported and ironic. Union counsel in this case has previously brought vested rights claims in federal court, and there are numerous examples of similar vested rights litigation in federal

court.[4] And it is the unions who threatened federal claims with respect to Measure B, but who then artfully pleaded their cases to avoid mentioning federal law. If anyone is forum shopping in this case, it is the unions.

Firefighters' Local 230 initially asserted in its motion to dismiss that it was had raised federal claims, but then filed "errata" pleadings to remove any reference to federal law, obviously in an effort to control the forum and avoid removal. (See Docket No. 9 (Memo of Points and Authorities in Support of Motion to Dismiss) and No. 25 (Errata to Memorandum).) And Firefighters' Counsel Christopher Platten of Wylie, McBride, Platten & Renner (and counsel for IFPTE Local 21 and Operating Engineers Local 3 in this action, and for plaintiffs in the *Sapien*, *Harris*, and *Mukhar* state-court actions), stated in a declaration filed in support this motion to dismiss: "Prior to the date the City Council voted to place Measure B on the ballot for the June election in the course of negotiations on behalf of Local 230 and Local 21 with representatives of the City, I repeatedly advised these representatives that provisions of the proposed ballot measure were fatally unconstitutional under both state and *federal* constitutions." (Hartinger Decl., ¶13, D.) Similarly, AFSCME Local 101 President Yolanda Cruz argued, prior to Measure B's enactment, that the City's proposed Charter amendments violate the United States Constitution. (Hartinger Decl., ¶14, Ex. E.)

Additionally – and perhaps most importantly – in their answers to the City's Federal FAC, three unions (Firefighters' Local 230, IFPTE Local 21, and Operating Engineers Local 3) *admitted* to the allegations in paragraph six. Paragraph six of the City's Federal FAC states (underlining added):

> ¶6. ...A declaratory judgment is necessary to confirm that Measure B does not impair any vested rights, does not violate the contracts clauses of the federal and state constitutions, and does not violate federal or state due process guarantees, or any of the other legal rights claimed by defendants.

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[4] *See Hanford Executive Management Employee Association v. City of Hanford*, 2012 U.S. Dist. LEXIS 23161 (E.D. Cal. Feb. 23, 2012), supra, in which a union – represented by the law firm of Carroll Burdick & McDonough, which represents the POA in this case – filed a lawsuit in federal court on behalf of its members claiming violation of vested rights.

> This judgment is necessary because the defendants contend, on behalf of the their members, that Measure B contains provisions that violate employee vested rights to certain retirement contributions and benefits and is (all or in part) a violation of the contracts clauses, federal and state due process guarantees, and other laws.

The unions have intentionally failed to plead the very federal claims they admit must be decided. By rewarding them with abstention, the Court will encourage the very gamesmanship that *Brillhart* stands against.

Ultimately, the City's choice to proceed in federal court was a proper decision to proceed with all claims in federal court. Under *Brillhart*'s second factor, discouraging forum shopping, the court should retain jurisdiction:

> "The second aspect of the inquiry is fairness. The circuits' varying formulations all distinguish between legitimate and improper reasons for forum selection. Although many federal courts use terms such as "forum selection" and "anticipatory filing" to describe reasons for dismissing a federal declaratory judgment action in favor of related state court litigation, these terms are shorthand for more complex inquiries. The filing of every lawsuit requires forum selection. Federal declaratory judgment suits are routinely filed in anticipation of other litigation. The courts use pejorative terms such as "forum shopping" or "procedural fencing" to identify a narrower category of federal declaratory judgment lawsuits filed for reasons found improper and abusive, other than selecting a forum or anticipating related litigation. Merely filing a declaratory judgment action in a federal court with jurisdiction to hear it, in anticipation of state court litigation, is not in itself improper anticipatory litigation or otherwise abusive "forum shopping."

Sherwin-Williams Co. v. Holmes, 343 F.3d 383, 391 (5th Cir. 2003). Here, the City filed a comprehensive action in federal court so that the validity of Measure B under both federal and state law could be resolved in one forum through one action. That goal is "entirely consistent with the purposes of *the* Declaratory Judgment Act." *Sherwin Williams*, *supra*, at 398-99, quoting *Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n*, 996 F.2d 774, 777 (5th Cir. 1993) (emphasis in original).

(iii) A Stay under *Brillhart* Will Encourage Duplicative State-Court Litigation.

Staying this case under *Brillhart* will encourage duplicative litigation, not control it. Tellingly, neither the POA, AFSCME, nor the *Sapien* plaintiffs have offered to waive their federal claims or have stated that federal claims need not be adjudicated because Measure B is lawful

under the U.S. Constitution. Apparently, they seek to preserve the option for a second round of federal litigation if their state-court actions are unsuccessful.

Here, the interest of efficiency will be best served by the Court's adjudicating the City's federal action. The City's Federal FAC is the most comprehensive of all six pending actions. At present, the City's Federal Action encompasses all legal issues in the state-court actions except two: AFSCME's bill-of-attainder and ultra-vires-tax claims. The only reason the City's Federal FAC does not address these claims is because AFSCME filed its complaint after the City filed its FAC. The City intends to amend its complaint to add these two issues.[5]

In contrast, the unions are attempting to prosecute five separate actions in state court, rather than a single efficient proceeding. In considering abstention under *Brillhart*, district courts also take into account the "general policy of avoiding piecemeal litigation" when determining whether to retain jurisdiction. *Continental Casualty Co. v. Robsac Industries*, 947 F.2d 1367, 1371-73 (9th Cir. 1991), overruled on other grounds in *Dizol*, 133 F.3d at 1227.

Furthermore, the City's Federal Action is the only action that includes all parties and their privies. In fact, the City amended its original federal complaint to ensure that all stake holders were united in a single action. This is not the case with any of the state-court actions. Rather than abstaining in favor of the state-court actions, the Court should retain jurisdiction here.

Finally, the unions have argued that the City's Federal FAC is inadequate because it does not include individual employees as defendants. (POA Opp to State-Court Motion to Stay at p. 3:22-25; AFSCME Opp. at p. 9:6-8; *Sapien* Opp. at p. 3:21-22).) The City does not believe it is necessary, or appropriate, to bring individuals into this Measure B litigation. But the FAC includes DOE defendants, under which individuals could be named. Moreover, the City is willing to name individuals through stipulation and order, if the unions and the Court insist.

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[5] Firefighters' Local 230 argues that the state-court actions "are more far reaching" than the City's Federal claim. (Firefighters' Memo at p. 7:7-8.) That claim was premised on the absence of Operating Engineers Local 3 from the federal action and on the lack of individual plaintiffs. (Id. at p. 7:8-15.) Operating Engineers Local 3 is now a defendant in this action, and as discussed herein, the City will name individuals if this Court concludes it is necessary.

The City has crafted its Federal FAC to allow all parties to adjudicate all issues in a single action, whereas the unions attempt to prosecute piecemeal litigation.[6] The Court should prevent this attempt and stay the state-court actions.

(iv) The Ninth Circuit's Additional *Brillhart* Factors Militate in Favor of Retaining Jurisdiction.

Finally, the Ninth Circuit's additional factors counsel in favor of retaining jurisdiction. First, an adjudication of validity of Measure B will certainly "clarify the legal relations at issue." *Dizol,* 113 F.3d 1220, 1225 n.5. Additionally, the City's action is not filed sought for purposes of procedural fencing; rather, it the *unions* who are forum shopping. *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 390 n. 2 (5th Cir. 2003) (noting that "procedural fencing" means that the action is merely the product of forum shopping). Finally, the declaratory action should not result in entanglement between the federal and state court systems. The City has filed a motion to stay the state-court actions which will be heard on August 23, 2012.

IV. CONCLUSION

As is often quoted in the *Brillhart* line of cases: "Essentially, the district court 'must balance concerns of judicial administration, comity, and fairness to the litigants.'" *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, (9th Cir. 2005) (citations omitted). The City has always sought a fair, efficient and comprehensive resolution of all claims related to Measure B. The City's federal lawsuit unquestionably will accomplish this purpose.

This case was pledged to the voters and publicly announced prior to its filing. It was intentionally comprehensive to ensure that both federal and state law claims can be resolved fairly and efficiently. Furthermore, it is currently pending in a federal court, which is an appropriate forum for this matter. The Court should exercise its discretion to retain jurisdiction of the action,

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[6] AFSCME argues that a federal court decision in this action "would lack precedential value" and, as such, weights in favor of abstention. (AFSCME Opp at. p. 10:5-7.) AFSCME neglects to explain that similarly a state-court decision on the City's federal claims would likely not create precedent binding on federal courts in a future action by a current non-party.

and permit the City to proceed with its plan to efficiently resolve questions regarding the validity of Measure B.

DATED: August 20, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: /s/ Arthur A. Hartinger
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CITY OF SAN JOSE,

Plaintiff,

v.

SAN JOSE POLICE OFFICERS' ASSOCIATION; SAN JOSE FIREFIGHTERS; I.A.F.F., LOCAL 230; MUNICIPAL EMPLOYEES' FEDERATION, AFSCME, LOCAL 101; CITY ASSOCIATION OF MANAGEMENT PERSONNEL, IFPTE, LOCAL 21; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 3; and DOES 1-10,

Defendants.

No. C12-02904 LHK PSG

CONSOLIDATED REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, TO DISMISS OR STAY BASED ON FEDERAL ABSTENTION PRINCIPLES

[CONCURRENTLY-FILED SUPPLEMENTAL DECLARATION OF GREGG M. ADAM; SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE]

Date: October 4, 2012
Time: 1:30 p.m.
Place: Dept. 8
Judge: Hon. Lucy H. Koh

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I. INTRODUCTION

Rejecting several of the arguments the City of San Jose ("the City") advances before this Court, on August 23, 2012, the California Superior Court ***denied*** the City's request to stay the state court litigation regarding the legality of Measure B. *See* Suppl. Adam Decl. ¶¶ 5-6; Supplemental Request for Judicial Notice ("Suppl. RJN") Exs. 1-2 (State Court Proposed Order & State Court's Tentative Ruling).[1] The state court did, however, consolidate ***all*** the union's state court cases for pre-trial purposes, effectively resulting in a unified state court action. *Id.* The lead case is the procedurally-proper one filed by SJPOA. *Id.* The state judge's order was motivated by California's strong interest in protecting public employee pensions and deciding state law issues, as well as the City's ability to bring its federal claims in state court. *See* Suppl. Adam Decl. ¶ 6. The state court order does not decide this Court's federal subject matter jurisdiction, but nonetheless substantially impacts the unions' motions to dismiss.

Contrary to the City's argument, the existence of the state court litigation does not somehow create or verify that federal subject matter jurisdiction exists here. First, Article III does not apply in state courts. *Gutierrez v. Pangelinan*, 276 F.3d 539, 544 (9th Cir. 2002). In fact, California law specifically allows adjudication of "future" controversies. *County of San Diego v. State*, 164 Cal.App.4th 580, 606 (2008) ("The 'actual controversy' language in Code of Civil Procedure section 1060 [the California declaratory relief statute] encompasses a probable future controversy relating to the legal rights and duties of the parties.")

Second, the City's other justiciability arguments are wrong on the law and unpersuasive on the facts here. As to ripeness, there is no question this case was filed even before Measure B was passed by the voters. As to the prohibition against advisory opinions, the City has repeatedly admitted that it "would seek declaratory relief *before* implementing most provisions of Measure B." Dkt. 60 (City's Opp. to Motions to

[1] The transcript of the hearing will be filed as soon as it is available, as will the State Court's Order.

Dismiss ("Opp.") at 1:13-14) (emphasis added). That is consistent with its First Amended Complaint ("FAC"), which expressly pleads that Measure B is not self-executing and that it requires implementing ordinances. FAC ¶¶ 9, 10, 29.G, 33, 34. It is also consistent with its representations to the state court. *See* Dkt. 43 (SJPOA's RJN in support of Motion at Ex. 3 (City's Opp. to TRO)). Yet the City now tries to reverse course and argue around its allegations, perhaps realizing it pled itself out of federal court. Additionally, the City tries to factually distinguish the advisory opinion cases, but fails to address the legal principles therein, which squarely apply here. And the City's admission that the ever-expanding content and scope of its federal complaint is driven by the unions' *state court complaints* further demonstrates the City seeks an unlawful advisory opinion. Although the City dismisses these ripeness and advisory opinion concerns as hypertechnical, the truth of the matter is they are fundamental to this Court's jurisdiction. Indeed, what the City seeks here is this Court's legal advice and an imprimatur that Measure B is constitutional, an issue so dubious the City Council authorized the City to file suit even before the voters enacted it.

As to standing, the City insists the federal Declaratory Judgment Act relieves it of the burden to establish standing. But the vehicle for the relief it seeks does no such thing because standing is constitutionally mandated. Moreover, this is not like an ordinary insurance or other contract action where the parties have bilateral rights against each other that flow from a written instrument. And that is especially true because the City of San Jose cannot allege any injury let alone one traceable to the union defendants.

Third, even if this Court finds the City satisfied Article III's justiciability requirements, the ongoing state court litigation heavily favors abstention because, among other things, there is no question the state case is moving forward and will decide the state law issues therein. That means that without a dismissal or stay of this action, two courts will unnecessarily adjudicate the legality of Measure B. To the extent the City's federal claims are genuine, as opposed to being brought for purposes of forum shopping, they can seek to bring them in the state action.

Because the City cannot amend its complaint to cure the justiciability concerns, dismissal with prejudice is warranted. If this Court instead decides to abstain, defendants submit dismissal is still warranted and/or this Court should stay this case pending resolution of the state litigation.

II. SUMMARY OF ADDITIONAL RELEVANT FACTS AND PROCEDURAL BACKGROUND

The City misrepresents the facts leading up to Measure B, as well as the ensuing litigation. The City asserts that its "ability to provide . . . essential services [is] threatened by . . . . budget cuts caused in large part by the climbing and unsustainable cost of employee benefit[s]" (Opp. at 4:24-26, citing FAC ¶ 3), but the California State Auditor recently determined that the City of San Jose's retirement cost projections were "unsupported and likely overstated." *See* Suppl. RJN Ex. 3 (California State Auditor's Report, August 2012 at 1 [the City "referred to a projection that the city's annual retirement costs could increase to $650 million by fiscal year 2015–16, a projection that our actuarial consultant determined was unsupported and likely overstated"]).

The City accuses the unions of forum shopping, but the true facts show the opposite. First, although the City represents that "[i]n keeping with the City Council's plan" it filed this federal action on Primary Election Day, June 5, 2012 (Opp. at 5:21), the City Council's resolution does ***not*** direct that the litigation be filed (1) before Measure B was enacted, or (2) in federal court. *See* Hartinger Decl. ¶¶ 4-7 and Ex. A-C. Second, the City filed this action even before Measure B was enacted by the voters, and it did so without any warning. Specifically, SJPOA notified the City on June 5 that the following day it would file a state complaint and seek an injunction against implementation of certain parts of Measure B, both as a professional courtesy and per the California Rules of Court. *See* Suppl. Adam Decl. ¶ 3. The City, by contrast, did not inform SJPOA it intended to file this suit before Measure B was enacted. *Id.* ¶ 4. Third, even though the City filed its Complaint on June 5 (and the clerk issued summons the same day), the City did not bother to serve the union defendants until more than a month later. *See* Dkt. 39. It

later filed the FAC, which the City admits it amended to parrot the legal theories pled by the unions in the state complaints. Opp. at 5-6.

Finally, the Santa Clara Superior Court denied the City's motion to stay the state court proceedings, where it raised many of the arguments it does here. Specifically, Judge Patricia M. Lucas found that the complaints in the unions' state complaints raise state law issues regarding Measure B that have not yet been, and should in the first instance be, decided by a state court. The state judge's order was motivated by California's strong interest in protecting public employee pensions and deciding state law issues, as well as the City's ability to bring its federal claims in state court. The state court consolidated the cases for pretrial purposes. Suppl. RJN Ex. 1; Adam Decl. ¶ 6.

III. THE CITY FAILS TO SATISFY ITS BURDEN OF DEMONSTRATING JUSTICIABILITY

The party invoking federal jurisdiction has the burden of establishing it exists. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Dismissal with prejudice is warranted because the City fails to meet that burden.

A. The City Admits It Prematurely Filed This Case, and It Cannot Argue Its Way Around the FAC's Factual Allegations That Measure B Requires Implementing Ordinances

1. This Action Was Filed Before Measure B Was Enacted

The City does not dispute, nor can it, that this case was filed before Measure B was enacted by the voters. It nonetheless argues this case was not unripe when filed because "an actual controversy exists if [a] contingency is likely to occur." Opp. at 11:14-15. But unlike its cited case, *Employers Ins. of Wasau v. Fox*, 522 F.3d 271, 278 (2d Cir. 2008), this case does not involve a "contingent liability" between parties in a contract action. In *Fox*, there was no question the contract at issue already existed. By way of analogy, what the City did here by filing before Measure B was enacted is like filing a declaratory relief action even *before* there is an enforceable contract. That is, the issue here is not one of contingent liability, but rather that when this case was filed Measure B was not the law of San Jose. The City gives no cognizable reason why it filed its action prematurely. No such reason exists, other than the City's race into federal court.

On the date of filing, Measure B was merely a proposed referendum. Measure B did not exist as law, and, therefore, there was no "real and substantial" conflict in the form of a "definite and concrete" dispute. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-27 (2007); *see also Diaz v. Dade County*, 502 F. Supp. 190 (S.D. Fla. 1980) (dismissing pre-enactment challenge to referendum on ordinance). The standard for ripeness is not toothless and requires dismissal when no real controversy exists at filing. *See Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 671 (9th Cir. 2005).[2]

The City fails to meaningfully distinguish SJPOA's cases. For example, the City argues that *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) and *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1062 (D. Ariz. 2001) only address mootness and not ripeness. But this is untrue. A dismissal for mootness or lack of ripeness is, at its core, based on the same reason under Article III: a justiciable controversy must exist at ***all*** stages of a case. *See Arizonans for Official English*, 520 U.S. at 67 ("an actual controversy must be extant at all stages of review"); *see also Allen v. Wright*, 468 U.S. 737, 750 (1984) ("All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to . . . constitutional and prudential limits.").

The City distinguishes *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), arguing that case is somehow distinguishable from the present one because it addressed the matter of "a sufficiently concrete injury" under Article III. *See* Opp. at 12:19. But in *Lujan*, the Supreme Court reiterated its "longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed." *See* 504 U.S. at 571 n.4. Similarly, the City reduces the holding in *Renne v. Geary*, 501 U.S. 312, 320 (1991) to a mere inquiry as to whether a concrete injury was alleged. *See* Opp. at 12:22-28. But *Renne* directly addresses ripeness, and finds it was not satisfied. *See* 501 U.S. at 315

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[2] The City claims an exception to ripeness, citing *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). But that case discusses statutory exceptions to personal jurisdiction and it nowhere discusses ripeness.

("Having examined the complaint and the record, we hold that respondents have not demonstrated a live controversy ripe for resolution by the federal courts."). That holding was based on the Supreme Court's conclusion that, at the time of the filing of the complaint, the challenged state constitutional provision had not been applied to any plaintiff, nor was application of the provision alleged to be imminent. *Id.* at 319-23. That the state constitutional provision could cause a controversy because it could be applied in the *future* was insufficient to establish ripeness. *Id.* at 320.

SJPOA's procedurally-proper *state* court action filed *after* Measure B went into effect does not create an Article III justiciable controversy in federal court. As outlined above, SJPOA gave notice not because it "acknowledged that Measure B was likely to be enacted," but because it was required to do so by state procedural law. *See* Cal. Rule of Court 3.1203; Adam Decl. ¶3. Although the City insists this was an "admission" of ripeness (Opp. at 11-12), subject matter jurisdiction cannot be created by admission or otherwise waived. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *Chapman v. Pier 1 Imports*, 631 F.3d 939, 954 (9th Cir. 2011).

2. The City Cannot Argue Around the FAC's Allegations

The City has no meaningful response to SJPOA's argument that the FAC pleads an unripe case. Instead, it misleadingly re-characterizes the FAC's allegations that admit Measure B requires implementing ordinances (*e.g.*, Mot. at 14-15 n.1), but it does not explain why these allegations are not factual *admissions* that Measure B is not self-enacting and requires further implementation actions by the City. *See* FAC ¶¶ 9, 10, 29.G, 33, 34; *see also* Part III.D, *infra.* Those admissions are consistent with the position the City took in state court. SJPOA's RJN in support of Motion at Exs. 3 (Opp. to TRO) & 5 (City-SJPOA state court stipulation staying Measure B's enforcement.) .

The City relies heavily on an inapposite administrative law case, *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) for the proposition that a matter is fit for decision "if the issues raised are primarily legal, do not require further factual

development, and the challenged action is final." Opp. at 13:27-28. But, an entirely separate standard guides ripeness analysis of challenges to administrative rulings. *See id.; Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 670-671 (9th Cir. 2005) (no case applies the latter standard outside the administrative law context; appropriate standard for determining ripeness is the traditional ripeness standard). Regardless, the FAC fails even this test because at the time of filing Measure B had no "direct and immediate effect," nor did it have "the status of law," nor did it require "immediate compliance with its terms." *Stormans*, 586 F.3d at 1126; see FAC ¶¶ 9, 10, 29.G, 33, 34.

The City unpersuasively distinguishes *Texas v. United States*, 523 U.S. 296 (1998), arguing that this case is ripe because Measure B is purportedly "effective without regard to other events." Opp. at 15:6. But the FAC alleges that Measure B is dependent on implementing ordinances—ordinances which have yet to be drafted, let alone approved. *See* FAC at ¶¶ 9, 10, 29.G, 33, 34. More to the point, the missing link in Texas and in this case is implementation of the very statutes at issue. *See* 523 U.S. at 300-301.

B. The City Seeks a Quintessential Advisory Opinion, Which Federal Courts are Powerless to Give

The City insists it does not seek an advisory opinion because "Measure B ***will have*** a concrete effect on City employees." Opp. at 15:18-19 (emphases added). But even if the City had standing to assert city employees' claims (and it does not; *see* III.C, *infra*), there is no question that what the City seeks is a judicial decree validating Measure B as legal in all applications, regardless of the facts or parties involved.[3] *See* FAC ¶¶ 6, 8, 31. As SJPOA outlined in its moving papers, that is a quintessential advisory opinion because it asks this Court for an advance ruling on the legality of Measure B even before it is implemented. *See* Dkt. 41 at 6:18-11:18.

[3] Indeed, the City has repeatedly admitted the unions' state complaints drive the content and scope of the federal action, , and that it will seek further amendment of its ever-expanding complaint to capture any additional causes of action, such as those brought by AFSCME. *E.g.*, Suppl. RJN Ex. 5 (City's State Court Stay Mot.) at 3-9, 10 n.2.

As pled, this case "is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that [the constitution] does not govern hypothetical situations." *Longshoremen v. Boyd*, 347 U.S. 222, 224 (1954). As the court in *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 880, 884 (N.D. Tex. 2008) observed:

> "[I]n a typical lawsuit involving the constitutionality of a piece of legislation, the local or state government passes a law, and some person or group files a lawsuit arguing that the recently-enacted law violates some provision of the United States Constitution and seeks an injunction to prevent the enforcement of that law. Here, [the city] has put the cart before the horse [by seeking declaratory relief that its ordinance is constitutional] . . . The court is in no position to anticipate the challenges that might be made to the [n]ew [o]rdinance."

See *also Fox*, 522 F.3d at 276 n.4 ("a [party] should not be permitted to file a preemptive action in order to deprive the natural plaintiff of its choice of forum").

The City makes two principal arguments why it does not seek an advisory opinion: (1) Measure B purportedly does not require implementing ordinances (Opp. at 13:11-15:15 & n.1); and (2) "[h]ere the issues are not 'speculative,'" as they purportedly are in the advisory opinion cases (*id.* at 16:3-4). These arguments miss the mark. As outlined above, the FAC expressly pleads that Measure B is not self-enacting and requires implementing ordinances which the City has not yet written. FAC ¶¶ 8, 9, 10, 29.G, 33, 32. The City's legal arguments cannot contradict is factual allegations, which are judicial admissions. *See* Part III.D, *infra*. And contrary to the City's arguments, adjudication of the legality of Measure B under the FAC it pled is "speculative" because the FAC *specifically* alleges Measure B has not yet been implemented. For example, the City asserts, without explanation or argument, that "there is no speculation as to the provisions of Measure B and how they will financially impact City employees" (Opp. at 16:8-9), but Measure B is a charter amendment (FAC ¶ 27), and it is far from self-evident how Measure B's unwritten and unenacted implementing ordinances and rules will impact city employees in separate retirement plans and in separate bargaining units.

More fundamentally, although the City factually distinguishes the advisory opinion cases, it fails to apply their core legal principles to the facts here. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), like this case, was a pre-enforcement challenge to a statute. *Id.* at 82 (noting appellants sought an injunction prohibiting enforcement of Hatch Act). For that reason, the Court refused to give "a declaration of the legally permissible limits" of the Hatch Act. *Id.* at 84. Similarly, here the City has not purported to enforce any of Measure B's sections on any individual represented by the union defendants and instead it asks this Court to define the legally-permissible limits of that law even before it is implemented. FAC ¶¶ 30-34; *id.* at 11-12. The same rationale explains *Hillblom v. U.S.*, 896 F.2d 426 (9th Cir. 1990). Although it is true that *Hillblom* did not involve a challenge to a specific statute, it is in principle identical to this case because even though here "there is a particular measure involved" (Opp. at 16:11), it is far from clear how Measure B's implementation through *unwritten* ordinances and rules will affect City employees' substantive rights. And the City mischaracterizes *Alameda Conservation Assoc. v. California*, 437 F.2d 1087 (9th Cir 1971). That case did not "refuse[] to rule on the legality of an anticipated quiet title action that had not yet materialized," Opp. At 16:20-21, but rather there the Ninth Circuit correctly refused to adjudicate *the effect of the statute at issue* on an anticipated state law quiet title action. *Alameda Conservation Assoc.*, 437 F.2d at 1093. That, too, is in principle indistinguishable from this case where the City asks this Court to decide the effect of Measure B based on anticipated legal challenges.

The City misunderstood the importance of *Aetna Life Ins. v. Haworth*, 300 U.S. 227, 241 (1937), which articulates why this Court cannot fashion an advisory opinion: federal courts cannot issue a decree "advising what the law would be upon a hypothetical state of facts."[4] *See also Alabama State Federation of Labor v. McAdory*,

[4] *Haworth* additionally found an actual controversy existed because it was a contract action and the parties apparently had bilateral rights against each other. *Id.* at 242. That is a far cry from this case involving a charter amendment which has not yet been enforced or implemented through the ordinances and rules the City admits are required.

325 U.S. 450, 471 (1945) ("It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the court is left in uncertainty . . . as to the meaning of the statute when applied to any particular state of facts.").

In fact, *Dixie Electric Cooperative v. Citizens of Alabama*, 789 F.2d 852 (11th Cir. 1986) and *City of Farmers Branch*, 577 F. Supp. 2d 880 are in principle indistinguishable from this case. In *Dixie*, a state legislature enacted a statute creating exclusive electric utility service areas. Like the City of San Jose's resolution calling for litigation on the legality of Measure B, the Alabama statute provided for a state judicial process to "validate" the legislation. That judgment was to be binding on all persons as to all issues concerning the validity of the statute. A validation action filed in state court was then removed to federal court. The federal appellate court concluded that the litigation improperly sought an advisory opinion: "A federal court may not, consistent with the Constitution, entertain a proceeding such as this one, that merely seeks validation of a statutory scheme and allows for the adjudication of potential issues that have not actually arisen." 789 F.2d at 857-858.

And in *City of Farmers Branch*, the court refused to give an advisory opinion on the constitutionality of the ordinance there not because "the [c]ity had made five different attempts to offer hypothetical alternatives for the [c]ourt's approval" (Opp. at 16:25-26), but rather because "the [n]ew [o]rdinance [has] not gone into effect" even though it was passed by the city council. 577 F. Supp. 2d at 884-885. That is, like the City of San Jose, the City of Farmers Branch sought an advance ruling that an enacted ordinance was constitutional even before it went into effect.

Finally, although the City insists "[t]here is nothing hypothetical about this litigation" (Opp. at 16:28-17:1), that is not true as framed by its complaint because it has admitted the need for implementing ordinances and because the City requests a ruling on

federal constitutional issues when no union—whose members would be detrimentally affected by Measure B—assert any federal claims.[5]

C. The City Lacks Standing Because the Declaratory Judgment Act Does Not Supplant Article III Standing Requirements

The City makes no attempt to satisfy Article III's standing requirements. *See* Mot. at 11:21-12:4 (explaining that standing requires: injury in fact, injury traceable to defendants, and a judgment that can redress injury, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). Instead, it inexplicably argues it "need demonstrate only the existence of an actual controversy between the parties" under the Declaratory Judgment Act. Opp. at 17:9-10. That is flatly incorrect. *Lujan* itself was a declaratory relief action and nowhere does it hold the Declaratory Judgment Act abrogates or relaxes Article III's standing requirements. *See id.* at 562-66 (finding plaintiffs in declaratory relief action had no Article III standing to seek ruling on legality of regulation); *see also Janakes v. U.S. Postal Service*, 768 F.2d 1091, 1093 (9th Cir. 1985) ("[T]he use of the declaratory judgment statute does not confer jurisdiction by itself if jurisdiction would not exist on the face of a well-pleaded complaint"). Thus, the existence of a controversy for purposes of the Declaratory Judgment Act does not confer standing because these are *separate* inquiries. That is, the Declaratory Judgment Act's "actual controversy" requirement is the equivalent of Article III's "case or controversy requirement." *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-240 (1937). It is not, however, a substitute for Article III's standing requirements. *Lujan*, 504 U.S. at 563 ("the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.").

Next, the City cites *Standard Ins. Co. v. Saklad*, 127 F.3d 1179 (9th Cir. 1997) and *Maryland Casualty Co. v. Pacific Coal & Oil*, 312 U.S. 270 (1941) for the proposition that "[a] person may seek declaratory relief in federal court if the one against whom he

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[5] The City also tries to distinguish *Waialua Agr. Co. v. Maneja*, 178 F.2d 603 (9th Cir. 1949) because "no specific facts were alleged about individual employees" (Opp. at 17:4)—but the same is true here.

brings his action could have asserted his own rights there" and that courts may "reposition the parties" accordingly. *Saklad*, 127 F.3d at 1181. But for that principle to apply, the declaratory judgment defendant's anticipated claims "***must*** arise under federal law." *See Janakes*, 768 F.3d at 1093 (emphases added; citation and quotations omitted). The unions assert only state law claims.

More fundamentally, applying the rationale of the City's cited cases (involving contracts where the parties have bilateral rights against each other based on a written instrument [*e.g., Saklad*, 127 F.3d at 1181]) makes no sense in a case like this one. For example, according to the City, these cases mean that here "the issue is whether the City employees and retirees could be plaintiffs seeking a federal remedy" and thus because its employees would have standing so does the City. Opp. at 17:23-26; *id.* at 18: 5 (arguing "[t]he question here is whether the [union] defendants can allege injury, not the City," even though it filed suit and has burden to show standing).

But the reason the employees would have standing is because they would satisfy Article III's requirements of injury in fact, traceable to the City's conduct, in a redressable order—but that does ***not*** mean that, when the City files suit, the employees' standing is somehow transferred to the City, especially because the City suffers no injury and the employees caused it no injury. The City does not argue or allege it is adversely affected by Measure B. For this reason, the City's argument that the unions could bring federal claims misses the mark; they do not. But even if they did, they certainly could because their members have Article III standing; that does not mean the City also has standing or even that it would have standing to assert the employees claims for them. *See Lujan*, 504 U.S. at 563 (to satisfy "the 'injury in fact' test . . . the party seeking review [must] be himself among the injured."). This requirement is no less stringent in declaratory relief actions. *See, e.g, id.*; *Alameda Conservation Assoc.*, 437 F.2d at 1091 ("[S]tanding focuses on the party seeking to place his complaint before the court," that is, "the applicant at the judicial door who will *himself sustain injury* in fact, economic or otherwise.") (emphasis added).

The City insists it is "entitled to bring a declaratory relief action in order to obtain a legal ruling in advance of any potential injury to its employees" giving rise to damages, citing a patent case, *Societe de Conditionnement v. Hunter Eng. Co.*, 655 F.2d 938 (9th Cir. 1981). Opp. at 18:2-4. Not only is such an action barred as an improper advisory opinion (*see* Part III.B., *infra*), but this rationale too has no place here because the City admits that on the day of filing it knew SJPOA would file suit in state court and seek to enjoin Measure B immediately after passage (*see* Opp. at 6:10-12; Hartinger Decl. ¶ 16), foreclosing any purported damages claims by union members.

D. Dismissal With Prejudice is Proper Because Amendment Will Not Cure the Fundamental Jurisdictional Defects

Even if this Court were to dismiss with leave to amend, the City's Second Amended Complaint could not cure the jurisdictional defects because it cannot allege facts that contradict those already alleged in the FAC, *e.g.*, the City cannot plead that Measure B is self-enacting and does not require implementing ordinances. A plaintiff may not state a claim relying on allegations that directly contradict those made in an earlier complaint. *See Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co.*, 976 F.2d 58, 61 (1st Cir. 1992) ("A party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding." (internal quotation and citation omitted); *see also Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990) (affirming denial of motion for leave to amend where plaintiff could not allege a new injury for standing purposes, without contradicting the original complaint); *Wienke v. Indymac Bank FSB*, No. CV-10-4082 NJV, 2011 WL 2565370, at *4 (N.D. Cal. June 29, 2011) ("Leave to amend should be liberally granted, but an amended complaint cannot

allege facts inconsistent with the challenged pleading."). Thus, dismissal with prejudice and without leave to amend is warranted.[6]

IV. FEDERAL ABSTENTION PRINCIPLES MILITATE IN FAVOR OF DISMISSAL OR STAY IN FAVOR OF THE CONSOLIDATED STATE LITIGATION

At the outset, the City argues that "the strongest factors" against abstention are "(1) there are unquestionably federal claims at issue in this case; and (2) the federal forum is thus the only forum where all pleaded issues—both state and federal issues—can be resolved . . . at one time." Opp. at 4:11-14 (italics omitted). But, the City is the only party asserting any federal claims and it does so in an unripe action, without standing, and seeking an advisory opinion. Moreover, it never explains why state court—where the unions' state law claims will proceed as an action consolidated for pre-trial purposes—is not an appropriate forum for its federal claims. Regardless, abstention is proper on the facts of this case.

A. *Brillhart* Abstention is Proper Because The State Court Action Will Resolve the State Law Issues and thus this Federal Court Need Not Determine Them, and Because the City's Forum Shopping Should Not be Countenanced

The City insists the standard set forth in *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942) is not met and purportedly weighs in favor of retaining jurisdiction. That is incorrect. *See* Mot. at 14:25-28 (*Brillhart* examines (1) avoiding needless determination of *state* law issues, (2) discouraging declaratory actions as means of forum shopping, and (3) avoiding duplicative litigation, citing *Robinson*, 394 F.3d at 672).

The City does not even address the first *Brillhart* factor at all, and instead argues abstention is improper because its complaint raises federal claims. Opp. at 29:19. But that does not change the fact that proceeding with the litigation here would require this Court to needlessly determine *state* law issues that the California Superior Court has

[6] The City distinguishes *Schreiber Distr. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, (9th Cir. 1986) because there "the district court did not determine . . . that the allegation of other facts could not possibly cure the deficiencies in [the] complaint." Opp. at 15:10-11. To the extent such a finding is necessary, the City does not explain why this Court cannot not make that finding here since it has painted itself into a corner by pleading that Measure B requires implementing ordinances and is not yet effective.

already determined it will decide in the first instance. Suppl. RJN Ex. 1-2; Suppl. Adam Decl. ¶¶ 5-6. More importantly, none of the City's cases support the proposition that *Brillhart* abstention is improper whenever a federal claim is raised, let alone that it is inappropriate when a city employer raises such claims to manufacture federal subject matter jurisdiction. *Wilton* does not so hold and in fact reaffirms that *Brillhart* abstention avoids "gratuitous interference" with state court actions. *Wilton v. Seven Falls Co.*, 515, U.S. 277, 283 (1995). Nor does *Verizon v. Inverizon*, 295 F.3d 870, 875 (8th Cir. 2002) (Bye, J., concurring): "we avoid directly holding that the district court's stay constituted an abuse of discretion because of the mere presence of federal trademark issues." In fact, *Verizon* reversed a *Brillhart* stay because the federal issues in that Lanham Act case were "controlling." 295 F.3d at 873 ("Today the Lanham Act is the paramount source of trademark law . . . [and is] interpreted almost exclusively by the federal courts"). That fundamentally distinguishes it from this case where the federal issues are not.

As to the second element, the City accuses the unions of forum shopping even though it (1) filed this procedurally-defective action even before Measure B was enacted, (2) waited several weeks to serve its complaint, (3) is the only party asserting any federal claims, (4) filed a FAC that essentially parrots the unions' state law complaints, and (5) fails to explain why it cannot bring its federal claims in state court. The City falsely claims that the unions have intentionally failed to plead the federal claims they admit must be decided, referring to scattered statements in various filings. But *Brillhart* examines whether allowing the *federal* declaratory relief action to proceed would encourage forum shopping. *See Robinson*, 394 F.3d at 672.[7] *Brillhart* is designed to prohibit fabrication of federal issues to obtain a federal forum. *See, e.g., Fidelity National Financial Inc. v.*

[7] Indeed, like its forum shopping accusation, the City's support for its union forum shopping accusations ring hollow. *See* Opp. at 31:27-33:3 (relying on *Hanford EMEA v. City of Hanford*, No. 1:11-CV-00828 –AWI-DLB, 2012 U.S. Dist. Lexis 23161 (E.D. Cal. Feb. 23, 2012) filed by SJPOA's counsel on behalf of unrelated union; an errata filing; co-counsel's declaration; a letter from AFSCME's president; and certain answers). Even if these supported the City's arguments (and they do not), the City cites no authority allowing such statements to be imputed to the other unions.

Ousley, 2006 WL 2053498, at *5 (N.D. Cal. July 21, 2006) (*Brillhart* abstention appropriate where plaintiffs forum shopped with a prematurely-filed complaint in federal court in response to notice of imminent state court action because "[i]t would be inequitable to reward plaintiffs' forum shopping . . . action filed prematurely for the purpose of securing the otherwise unavailable federal forum").[8]

The City's arguments on the third prong (avoiding duplicative litigation) are fatally undermined by the fact that the state court is proceeding with the unions' consolidated action—that is, allowing this federal case to proceed would essentially duplicate litigation already proceeding in state court.[9] The same is true of the City's efficiency arguments because there are no longer "five separate actions in state court" (Opp. at 34:9), and instead there is only one consolidated action. In fact, judicial economy and basic fairness heavily weigh in favor of abstention. The state court has ruled that the unions' consolidated cases will proceed. If this case, too, proceeds, judicial resources of two judicial forums are unnecessarily consumed. Abstention thus would avoid "entanglement between the federal and state court systems." *Robinson*, 394 F.3d at 672; *Pacific Bell Internet Services v. RIAA*, 2003 WL 22862662, at *6 (N.D. Cal. Nov. 26, 2003) (abstaining from declaratory relief action because it would create duplicative litigation).[10]

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[8] The City's desire for "a comprehensive action in federal court" adjudicating "the validity of Measure B under both federal and state law" (Opp. at 33:19-20), does not make *Brillhart* abstention improper, especially because it cannot overcome, e.g., advisory opinion concerns.

[9] Nor is there any risk of a "second round of litigation" (Opp. at 34:1) because, even if the unions later tried to file federal claims, the City would argue such claims were barred by res judicata and/or collateral estoppel

[10] The City argues that, although its FAC does not include individual employees as defendants, "it is not necessary, or appropriate, to bring individuals into this Measure B litigation," because the FAC includes DOE defendants and because it is "willing to name individuals through stipulation and order." Opp. at 34:18-22. However, a plaintiff may not name a DOE defendant in a federal court action (Fed. R. Civ. Proc. 10(a)), and, more crucially, the unions have no authority to compel their members to waive individual substantive constitutional rights by stipulation.

B. *Younger* Abstention Applies Because All Its Elements Are Satisfied

The City concedes the first three prongs of *Younger* abstention are met here: the presence of an important state interest, ongoing state proceedings, and its ability to litigate federal claims in state court. Mot. at 17:11-14, citing *M&A Gabaee v. Comm. Redevelopment Agency of City of L.A.*, 419 F.3d 1036, 1039 (9th Cir. 2005) (elements of *Younger* abstention); *Younger v. Harris*, 401 U.S. 37 (1971); *see also* Opp. at 18:20 (arguing only that "this action does not satisfy the fourth *Younger* test"). According to the City the "fourth" prong of *Younger* is "that the federal action will enjoin the state court action or have the effect of doing so." Opp. at 18:20-21. But as this Court has previously noted, that is simply another of way of assessing a determination inherent in the abstention analysis, "i.e., [whether the federal proceeding] would interfere with the state proceeding in a way that *Younger* disapproves." *Shyh-Yih Hao v. Wu-Fu Chen*, No. 10-CV-00826-LHK, 2011 U.S. Dist. Lexis 33149, *37 (N.D. Cal. Mar. 16 2011); *Younger v. Harris*, 401 U.S. 37 (1971); *accord AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007) (abstention proper when "there is a *Younger*-based reason to abstain"). That element is satisfied here.

In *Hao*, this Court recognized the fourth *Younger* prong is met when "a federal court's finding that a . . . statute . . . is unconstitutional would effectively enjoin enforcement of that statute in ongoing state court proceedings." 2011 U.S. Dist. Lexis 33149 at *39. Specifically, it found this fourth prong was not satisfied in *Hao* because "determination of Hao's claims to [certain property] will not enjoin or in any way impede the state-court [divorce] proceeding" involving Hao's sister. *Id.* at *40. Unlike *Hao*, here the fourth prong of *Younger* is satisfied because this Court's determination of the City's claims regarding the legality of Measure B will effectively enjoin and impede the consolidated state court action from making that determination by, *e.g.*, making Measure B constitutionally enforceable or finding Measure B is not constitutionally enforceable. Stated another way, if Measure B is found unconstitutional, the City would be unable to enforce it in state court—a situation prohibited by *Younger*. *Younger* abstention does not

require a direct injunctive effect on the state action, rather it is the *interference with* the state court action that is to be avoided. *Gilberston v. Albright*, 381 F.3d 965, 976 (9th Cir. 2004) ("interference with state proceedings is at the core of the comity concern which animates *Younger*") (citation omitted).

The City asserts this case does not enjoin or have the effect of enjoining the state action because (1) it is seeking only declaratory and not injunctive relief and (2) the state court action is free to proceed regardless of any ruling by this Court. Opp. at 20:3-20. But that ignores that a judicial declaration of rights can have the same effect as an injunction. *See, e.g., American Ass'n of Cosmetology Schools v. Riley*, 170 F.3d 1250 (9th Cir. 1999). Moreover, while it is true the state court action can proceed and, in fact is proceeding (after the City's request for a stay was denied), it is not true that this Court's decision will not effectively enjoin those proceedings. Given the substantial overlap in the claims between the state and federal litigation—indeed, they are coextensive by design as a result of the City's parroting the unions' state claims—any decision by this Court regarding the legality of Measure B would have the "practical" effect of enjoining the state proceedings. *See AmerisourceBergen*, 495 F.3d at 1151 (finding no enjoining or practical enjoining because there was no direct conflict between state and federal proceeding); *San Jose Silicon Valley Chamber of Commerce PAC v. San Jose*, 546 F.3d 1087, 1096 (9th Cir. 2008) (*Younger* prevented federal courts from granting declaratory relief that would have effect of "terminating or truncating" state proceedings). Additionally, the state actions seek injunctive relief and damages. *See* City's RJN Ex. H, I, J, K and L (state court complaints), and a ruling from this Court on Measure B's legality may, contra *Younger*, have the effect of preventing the union defendants from obtaining the relief they seek.

And that interference with the state court proceeding would be beyond the mere effects of res judicata or collateral estoppel (Opp. at 20:11-20) because this concurrent and wholly duplicative litigation goes to a core *Younger* concept that states must be able to decide state law issues in the first instance. *See AmerisourceBergen*, 495

F.3d at 1150 ("[t]he goal of *Younger* abstention is to avoid federal court interference with *uniquely* state interests such as preservation of these states' peculiar statutes, schemes and procedures"); *id.* at 1151 (abstention proper "to avoid concurrent, duplicative litigation . . . in particular, when the requested relief in federal court is a declaratory judgment").

Further, the City incorrectly argues that *Potrero Hills Landfill Inc. v. County of Solano*, 657 F.3d 876 (9th Cir. 2011) held that "*Younger* abstention applies only when the federal plaintiffs bring challenges to the very processes by which states render and compel compliance with their judgments." Opp. at 20:25-26. That grossly mischaracterizes *Potrero Hills*. First, that case does not deal with the fourth *Younger* prong at all. *See* 657 F.3d at 883 n.8 ("[w]e need not discuss the fourth component of *Younger* abstention, for only if all three threshold . . . requirements are satisfied do we then consider" that element). Instead, it deals with the important state interest prong (*id.* at 883), which the City conceded has been met and which the state court found existed when it refused to stay the state litigation. Second, *Potrero Hills* merely held that state mandamus proceedings do not automatically qualify for *Younger* abstention, not that abstention is prohibited in cases like this one involving important state interests and comity concerns. *See id.* ("state mandamus actions do not implicate any important state interests" and thus "dismissal based on *Younger*" improper).[11] Third, as with many abstention cases, a central reason the *Potrero Hills* court found abstention was improper is because the plaintiff there (a corporation against whom an ordinance was to be enforced) filed suit to vindicate its own civil rights. *Id.* at 890 ("a federal court's obligation to exercise its jurisdiction is particularly weighty when the federal plaintiffs before it seek relief under 42 U.S.C. § 1983 for violation of their civil rights"). That is simply not the case here because the City did not file this suit to vindicate any civil rights, and applying the

[11] Here, unlike in *Potrero Hills*, the City is an enforcement stance because it affirmative declaratory relief giving it permission to enforce Measure B. *Id.* (*Younger* abstention improper because Solano County was not in enforcement position).

rationale of such cases here—by the very entity alleged to have deprived them in the state court actions—would turn those cases on their head.

Finally, the City's own cases confirm that when *Younger* is satisfied, dismissal rather than a stay is proper in cases involving declaratory relief and no claim for damages. *See AmerisourceBergen*, 495 F.3d at 1148.

C. *Pullman* Abstention is Also Proper, and a Federal District Court Cannot Certify Questions to the California Supreme Court

The City admits the first prong of *Pullman* is met, a sensitive area of social policy best left to the states. *See* Opp. at 23:4-5, 25:16-17 (arguing only second and third prongs not met), *citing Railroad Commision of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). Instead, the City makes two arguments why *Pullman* abstention does not apply here. First, it argues *Pullman*'s other elements are not met because (a) a ruling on state-law issues will not obviate the need for federal adjudication; and (b) the relevant state law is "clear and well established." Second, it argues that even if *Pullman* applied, certification to the California Supreme Court is preferred over abstention. Opp. at 21:23-28. These arguments have no merit.

The City argues the second *Pullman* factor (a state decision could obviate the need for federal constitutional adjudication) is not met under the so-called "mirror-image rule." Opp. at 23:11-27. But the City's cited cases do not support its proposition. The City cites *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 n.4 (1984) for the unremarkable proposition that abstention "is *not required* for interpretation of parallel constitutional provisions." (emphasis added). But that case does not hold that abstention is improper as a matter of law in all cases where claims are brought under state and federal constitutional provisions, let alone that it is inappropriate on facts like those here. For example, *Almodovar v. Reiner*, 832 F.2d 1138 (9th Cir. 1987) and *Smelt v. County of Orange*, 447 F.3d 673, 681 (9th Cir. 2006), both cited in SJPOA's motion, are post-*Midkiff* cases affirmatively finding that *Pullman* abstention was proper because California state court's adjudication of state constitutional claims obviate the need for federal

constitutional adjudication. The City does not address *Almodovar* or *Smelt.*

More fundamentally, the policy reasons behind the mirror-image rule do not apply here because, as the City's own case confirms, cases applying that rule are driven by federal courts' duty to protect their "civil rights jurisdiction." *Stephens v. Tielsh*, 502 F.2d 1360, 1362 (9th Cir. 1974), cited at Opp. 23:25-24:1; *Pue v. Sillas*, 632 F.2d 74, 81 (9th Cir. 1980) (requiring abstention in mirror-image cases "would convert abstention in civil rights cases from an exception into a general rule"; further noting "state remedies supplement, but do not supplant, federal remedies under [42 U.S.C.] section 1983"). That is, these cases are motivated by not wanting to close the federal forum to civil rights plaintiffs—that is a far cry from this declaratory relief action where the *only* party asserting federal claims is a municipal employer in an attempt to manufacture subject matter jurisdiction.

Regardless, even cases applying the mirror-image rule acknowledge that "where the challenged statute is part of an integrated scheme of related constitutional provisions, statutes, and regulations, and where the scheme as a whole calls for clarifying interpretation by the state courts, we have regularly required the district courts to abstain." *Pue*, 632 F.2d at 80 (citation omitted). Measure B is a charter provision that will generate an integrated scheme of implementing ordinances and regulations. Abstention in favor of state constitutional interpretation would "avoid[] the risk of error" because "logic requires that the state constitutional [issues] be analyzed prior to reaching or framing any federal constitutional issues that depend upon the state law's meaning." *Id.* at 81.[12]

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[12] The City's argument that federal courts "are not bound by the decisions of state courts" in analyzing the federal contracts clause misunderstands the reason for *Pullman* abstention. *See* Opp. at 24:20-25:13. The unions' argument is not that state law conclusively decides federal constitutional issues, but rather that abstention in favor of state court adjudication on state law grounds (1) respects comity because it allows state courts to decide state law issues in the first instance, and (2) eliminates the need to unnecessarily reach federal constitutional questions when the parties' dispute can be resolved on narrower grounds. *See, e.g., Pacific Bell Internet Services*, 2003 WL 22862662 at *5 ("Uncertain questions of constitutional law should be addressed only when absolutely necessary.'")

For similar reasons, the third *Pullman* prong is satisfied. Contrary to the City's argument, this prong does not require that state law be "uncertain" (Opp. at 25:21), but rather that "any federal construction of the state law might, at any time, be upended by a decision of the state courts." *Smelt*, 447 F.3d at 679. The reason for that is that a federal court's interpretation of state law is not binding on state courts and could be upended by a contrary interpretation rendered by a state court. *See id.*; *accord Potrero Hills*, 657 F.3d at 889 ("when federal courts interpret state statutes in a way that raises constitutional questions, a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time—thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless") (citation omitted). Thus, although the City argues "this is a case that will be decided by the application of well-developed [state] law on vested rights" it admits that "[t]he law in this area is very fact specific [and] must be applied on a case by case basis." Opp. at 26:13-15. Indeed, if, as the City argues, state law is so uncertain and well-developed, it is unclear why it asks this Court to pre-approve Measure B even before it is implemented.

Pullman requires that such questions involving overlapping state law schemes be answered in the first instance by state courts. *See, e.g., Potrero Hills*, 657 F.3d at 889 ("the absence of a definitive state court interpretation of Measure E" raises *Pullman* concerns). For example, Measure B contains a severability clause. *See* FAC ¶ 29.H.; *see also* Ex. H at 59-64 (SJPOA's State Court Complaint). If Measure B is unlawful, this Court will have to delve into and weigh competing matters of legislative intent in the first instance, without the benefit of a state law ruling on Measure B. *See National Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (construing severability clause requires judiciary "to determine what [the legislative body] would have intended in light of the Court's constitutional holding"). Under *Pullman*, this should be done by state courts.

Resolving any ambiguities in Measure B requires construing and applying both state and local law, and particularly involves examining the interplay between the two. In

fact, the unions' consolidated case involves claims that Measure B conflicts with state law, which means that this Court will necessarily have to construe Measure B in relation to the laws of the state. *Potrero Hills,* 657 F.3d at 889; *Walnut Creek Manor v. Fair Employment & Housing Com.*, 54 Cal.3d 245, 268 (1991) (statutory provisions must be construed and harmonized with reference to the whole system of law of which they are a part). Resolving such conflicts between the state and its instrumentalities is a function best left to state courts and not federal courts, particularly where, as here, the litigation involves legislation of a state subdivision affecting the employees of the subdivision and the determination of the employees' rights with respect to retirement plans provided for under state law. These issues can all be fully resolved under state law (*see Spector,* 323 U.S. at 104-105 (constitutional avoidance doctrine favors the adjudication of the issues presented in this case in state court)) by a state tribunal that will resolve them with certainty and establish precedent for future cases.

More importantly, *Pullman* applies here because a state court's interpretation of Measure B is *necessary* to frame the constitutional issues. In *Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944), the court held that before federal courts could address a federal constitutional challenge to a state law, the state court should decide in the first instance whether the statute even applied. *Id.* at 104-105 (before deciding Commerce Clause challenge to state statute, a state court should decide whether the state even applied to interstate commerce; "our constitutional issues would either fall or . . . may be formulated in an authoritative way very different from any speculative construction of how the Connecticut courts would view this law and its application"). The City's own cases confirm this. *See, e.g., Babbit v. UFW*, 442 U.S. 289, 307-312 (1979) (three provisions of statute required state court interpretation before federal courts could reach

federal constitutional issues)[13]; *Fireman's Fund Ins. Co. v. Lodi*, 302 F.3d 928, 939 n.12 (9th Cir. 2002) (*Pullman* abstention proper to avoid federal constitutional claims), cited at Opp. 25-26. Similarly, here, a state court could definitively rule that Measure B cannot lawfully apply to current employees or retirees, which would moot the federal constitutional issues the City raises here.

Finally, the City argues that certification to the California Supreme Court is preferred over *Pullman* abstention. Opp. at 27: 6-28:13. That argument fails for numerous reasons. First, district courts cannot certify questions to the California Supreme Court. *See* Cal. Rule of Court 8.548 (attached as RJN Ex. 6). Certification was available in the decisions cited by the City because those cases were federal appellate decisions. Second, even if an appellate court, such as the Ninth Circuit, certifies a question, there is no guarantee that the California Supreme Court will accept certification because whether to accept certification it is wholly discretionary. *See id.* Given these uncertainties, certification is no substitute for *Pullman* abstention in federal district courts.

V. THIS COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER THE STATE LAW CLAIMS[14]

In its Motion to Dismiss, AFSCME argued that this Court should alternatively decline to exercise supplemental jurisdiction over the state law claims. The City failed to address this argument within its Opposition and, therefore, has waived any opposition. (*Foster v. City of Fresno*, 392 F.Supp.2d 1140, 1146 n.7 (E.D. Cal. 2005) ("[F]ailure of a party to address a claim in an opposition to a motion for summary judgment may constitute a waiver of that claim."); *see also Abogados v. AT&T, Inc.*, 223 F.3d 932, 937 (9th Cir. 2000); *Alexopulos v. Riles*, 784 F.2d 1408, 1411 (9th Cir.1986). Because the

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[13] *Harman v. Forssenius*, 380 U.S. 528, 543 (1965) does not support the City's argument. There, the court held unconstitutional a state statute presenting as an option to participating in federal elections the payment of a poll tax because the 24th Amendment had abolished the poll tax "*absolutely* as a prerequisite to voting." (emphasis added). Therefore, no construction of the statute could have changed the fact that it presented a poll tax option.

[14] This section applies to defendant AFSCME only.

California Superior Court declined to stay the state court plaintiffs' state court actions based upon its concern that a federal action could not resolve the state law issues, it make little sense for this court to also take up the state law issues. 28 U.S.C. § 1367(c)(4).

VI. CONCLUSION

For all these reasons, the Court should dismiss this action with prejudice for lack of subject matter jurisdiction. Alternatively, this Court should dismiss and/or stay based on federal abstention principles in favor of the consolidated state court action filed by the unions.

Dated: September 13, 2012

CARROLL, BURDICK & McDONOUGH LLP

By /s/
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Attorneys for Defendant
SAN JOSE POLICE OFFICERS' ASSOCIATION

Dated: September 13, 2012

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Dated: September 13, 2012

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2013 APR 24 P 3:47

PACHECO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT

No. 1-12-CV-225926
(and Consolidated Actions 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574, 1-12-CV-227864, and 1-12-CV-233660)

STIPULATION AND ~~[PROPOSED]~~ ORDER REGARDING PRE-TRIAL AND TRIAL SCHEDULE

RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10, inclusive, Defendants.	Complaint Filed: June 16, 2012 Trial: July 22, 2013
AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS	

WHEREAS, the above-captioned matters have been consolidated for pre-trial purposes;

WHEREAS, the Parties in all the consolidated cases have agreed that all causes of action and all claims in the separate complaints shall be tried on a consolidated basis;

WHEREAS, the parties met with the Court at the Case Management Conference on Friday, April 19, and the Court established certain deadlines which were placed on the record after the parties had the opportunity to meet and confer;

WHEREAS, the parties now desire to confirm the pretrial and trial schedule in this Stipulation and Proposed Order; and formed the following agreement;

IT IS HEREBY STIPULATED AND AGREED by and among the undersigned parties, by and through their counsel, as follows:

STIPULATION AS TO SCHEDULE FOR CITY'S PENDING MOTION FOR SUMMARY ADJUDICATION

1. The page length for the opposition briefs filed in response to the MSA shall be a maximum of 40 pages for Plaintiff San Jose Police Officers' Association and a combined maximum of 40 pages for Plaintiffs Sapien, Harris, and Mukhar, et al.'s cases. [1]

2. The hearing on the City's Motion for Summary Adjudication ("MSA") is now set to be heard in Department 2 on June 7, 2013, at 9:00 a.m.;

[1] The Court approved Plaintiff AFSCME's ex parte application requesting a page length extension for its opposition brief in response to the MSA brief on February 8, 2013, approving a 40-page maximum for AFSCME's opposition brief.

3. The opposition briefs of Plaintiff SJPOA and plaintiff AFSCME to the City's MSA and the combined MSA opposition brief of Plaintiffs Sapien, Harris, and Mukhar are now due May 3, 2013 and the opposition brief of San Jose Retired Employees Association (SJREA) is due May 8, 2013;

4. The City's Consolidated Reply brief shall be a maximum of 40 pages and is now due May 24, 2013 by Noon;

STIPULATION AS TO SCHEDULE FOR CITY'S PENDING DEMURRER IN AFSCME MATTER

1. The City shall have until April 23, 2013 to file and serve a reply brief.

2. The hearing on the demurrers shall be heard on April 30, 2013, in Department 2, at 8:30 a.m.

STIPULATION AS TO PRE-TRIAL AND TRIAL SCHEDULE, AND CERTAIN PROCEDURES

1. **Substance of the Action and Relief Sought**. By June 7, 2013, all parties shall serve by e-mail or hand on all other parties: (1) a list of all Sections of Measure B at issue in their complaints and the legal basis for their contentions to enable all parties to prepare proposed lists of evidence in advance of the pretrial conference; and (2) a complete statement as to the specific declaratory and injunctive relief requested.

2. **Initial Information Exchange**: On June 14, 2013, 28 days prior to the July 12 Pretrial Conference, the parties shall prepare and submit:

a. An initial list of joint exhibits, stipulated as to authenticity.

b. An initial list of stipulated undisputed facts.

c. An initial list of exhibits and facts not stipulated to.

d. An initial list of witnesses, if any, with declarations containing their testimony for trial or a brief statement describing the substance of the witnesses' trial testimony. This procedure does not preclude a party from noticing the deposition of a prospective witness or calling a witness at trial. Each side (with plaintiffs constituting one side and the City the other side) shall be limited to 15 witnesses per side. The parties shall

have the option of accepting the declarations as trial testimony, subject to objections, filing counter-declarations, and/or cross examining the witness at trial. Any witness designated either as a trial witness by brief statement or as a witness by declaration shall be made available for deposition as requested. If a declaration is accepted (regardless of whether there is cross-examination), the witness shall not be counted toward the 15-witness limit. If a declaration is not accepted and the witness testifies, then the testimony shall be counted toward the limit. All parties shall have an opportunity to depose trial witnesses.

c. An estimate of trial time for the each of the major issues to be addressed at trial.

3. **Schedule And Pre-Trial Conference:**

a. Schedule. The parties will adhere to the following schedule:

i. **June 20, 2013**. Final lists of proposed exhibits and trial witnesses, if any (with summaries of trial testimony and declarations), to be exchanged by e-mail or hand delivery.

ii. **June 27, 2013**. Motions in limine to be filed and served by e-mail or by hand delivery.

iii. **July 8, 2013**. Pretrial briefs and oppositions to motions in limine to be filed and served by e-mail or by hand delivery.

iv. **July 12, 2013, 9 a.m**. Motions in limine and other pretrial matters to be decided at a final pretrial conference.

v. **Trial, July 22, 2013**. Plaintiffs as a group and defendant City shall have equal time to present their cases at trial. The trial is set for five days.

b. Post-trial briefing. The parties propose that plaintiffs as a group and defendant City of San Jose each submit a proposed statement of decision and brief to the Court by a date set by the Court.

c. Trial. The Court shall set specific times when the trial will be in session;

d. The Court shall consider any other trial management matter which is likely to promote fair and efficient resolution of the case.

Dated: April 23, 2013

MEYERS, NAVE, RIBACK, SILVER & WILSON

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Dated: April ___, 2013

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Dated: April ___, 2013

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Attorneys for Plaintiffs and Cross-Defendants in *AFSCME*

d. The Court shall consider any other trial management matter which is likely to promote fair and efficient resolution of the case.

Dated: April ___, 2013

MEYERS, NAVE, RIBACK, SILVER & WILSON

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Dated: April ___, 2013

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Dated: April 23 2013

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Dated: April 21, 2013

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Dated: April ___, 2013

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Dated: April ___, 2013

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Dated: April ___, 2013

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Dated: April ___, 2013

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Dated: April ___, 2013

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By _____
~~Gregg McLean Adam~~
Amber L. West
Attorneys for Plaintiff and Cross-Defendant San Jose Police Officers' Association

Dated: April 22, 2013

SILVER, HADDEN, SILVER, WEXLER & LEVINE

By _____
Stephen H. Silver
Jacob Kalinski
Attorneys for Plaintiff San Jose Retired Employees Association

ORDER

The foregoing Stipulation having been received and good cause appearing,

IT IS SO ORDERED:

Dated: April 23, 2013

Hon. Patricia M. Lucas
Judge of the Superior Court

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